United States Court of Appeals for the Second Circuit

APPELLANT'S APPENDIX

77-2013

B

P/s

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2013

UNITED STATES OF AMERICA,
Appellant,

—against—

LAWRENCE ALFANO,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

FILED
APR 21 1977
A. DANIEL FUSARO, CLERK

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76C 1610 APPEAL COSTANTINO, J.

F 1

DIST/OFFICE	DOCKET YR	DOCKET NUMBER	FILING DATE MO DAY YEAR	J	N/S	O	R	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR	DOCKET NUMBER
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PLAINTIFFS	DEFENDANTS
ALFANO, LAWRENCE	USA
LAWRENCE ALFANO	UNITED STATES OF AMERICA

CAUSE

28 USC 2255 - motion to vacate or reduce sentence
Related case - 75 CR 298 (J. Judd)

ATTORNEYS

For PLNTFF:
MANTON, PENNISI DOWD & SCHWARTZ
120-10 Queens Blvd
Kew Gardens, NY 11415
793-2900

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	
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UNITED STATES DISTRICT COURT DOCKET

DC 111 (Rev. 1/75)

751,497

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ APR 15 1975 ★
TIME A.M. ....
P.M. ....

A 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- against - :

LAWRENCE ALFANO, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

75CR 298

SUPERSEDING INDICTMENT

Cr. No. ________
(T. 18 U.S.C. §659)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between April 25, 1973 and June 25, 1973, within the Eastern District of New York, the defendant, LAWRENCE ALFANO, did wilfully and unlawfully receive and have in his possession approximately two Air Transport Association airline tickets numbered 8213 865-043 and 8213 865-044 having a value in excess of One Hundred Dollars ($100), which goods had been stolen from Wings and Wheels Express Inc. while moving as a part of and constituting an interstate shipment of freight from Nashville, Tennessee to Newark, New Jersey, the defendant, LAWRENCE ALFANO, knowing the same to have been stolen. (Title 18, United States Code, §659).

COUNT TWO

On or about and between May 23, 1973 and July 23, 1973, within the Eastern District of New York, the defendant, LAWRENCE ALFANO, did wilfully and unlawfully receive and have in his possession approximately three Air Transport Association airline tickets numbered 8214-939-194, 8214-939-195 and 8214-939-196 having a value in excess of One Hundred Dollars ($100), which goods had been stolen from Wings and Wheels Express Inc. while moving as a part of and constituting an interstate shipment of freight from Nashville, Tennessee

BEST COPY AVAILABLE

A 2

76C 1610 USA vs ALFANO

DATE	NR.	PROCEEDINGS
9-2-76		BY PRATT, J. - Order to show cause ret. 9-10-76 at 10 AM before Judge Costantino why the judgment of conviction entered in this Co on the 5th day of December 1975 should not be vacated filed with memo of law and prood of service. (1/2)
9-17-76		Before COSTANTINO, J.- Case called for to vacate judgment Motion argued Decision reserved All papers due by 9-28-76
9-23-76		BY COSTANTINO, J. - Writ of Habeas Corpus issued. ---
9-24-76		Government's memorandum of law filed. (3)
9-29-76		Reply to govt's memorandum of law. (4
11-23-76		By COSTANTINO, J.-Order filed that parties appear in Crtrm#1 at 10AM on November 23,1976 for hearing to set bail. - (5
11-23-76		Before COSTANTINO, J- Case called-Motion Argued-Decision reserved-
11-26-76		Before COSTANTNIO, J.- Case called for motion for bail. Oral motion argued. Bail increased to $30,000.00 cash or surety
12/21/76		By Costantino, J dtd 12/21/76-memo and order--parties are ordered appear on 1/18/77 for the purpose of a hearing on merits--petitione bail is continued pending a final determination on the meriss filed
1/14/77		Sten's transcript dtd 11/26/76 filed.
1-18-77		Before COSTANTINO, J.--Case called. Motion to set aside judgment of conviction argued & granted. Court to submit order.
1-25-77		By COSTANTINO, J. - Order dtd 1-24-77 that the judgment of conviction filed in 75CR-298 be set aside and that the govt retry petitioner within 60 days filed. (9
1-25-77		NOTICE OF APPEAL FILED (USA) Copy mailed to C of A. (10)
2/9/77		Civil appeal scheduling order filed. (1
2/15/77		Letter of AUSA Barry Schulman to Costantino, J dtd 11/23/76 filed reference requesting bail by deft.
2-22-77		Sten. transcript dtd 9-17-76 filed.
3/7/77		Sten.'s transcript dtd 11/23/76 filed. (
3-7-77		Above record certified & handed to Barry Shulman for delivery to C of A. Criminal cases relating, 75 CR 298 & 74 CR 818 also certif and forwarded.
3/8/77		Sten's granscript dtd 1/18/77 filed.
3/11/77		Acknowledgement from C of A red'd of receipt for index on appeal & filed.
3-15-77		Sten. transcript dtd 1-18-77 filed.
3-28-77		Supplemental record certified and mailed to C of A.
3/29/77		Affidavit of mailing for index to record appeal filed.
4-1-77		Acknowledgment rec'd from C of A for record on appeal. (

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[illegible]751,497

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
APR 15 1975
TIME A.M. ....
P.M. ....

A 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- against - :

LAWRENCE ALFANO, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

75 CR 298

SUPERSEDING INDICTMENT

Cr. No. ____________
(T. 18 U.S.C. §659)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between April 25, 1973 and June 25, 1973, within the Eastern District of New York, the defendant, LAWRENCE ALFANO, did wilfully and unlawfully receive and have in his possession approximately two Air Transport Association airline tickets numbered 8213 865-043 and 8213 865-044 having a value in excess of One Hundred Dollars ($100), which goods had been stolen from Wings and Wheels Express Inc. while moving as a part of and constituting an interstate shipment of freight from Nashville, Tennessee to Newark, New Jersey, the defendant, LAWRENCE ALFANO, knowing the same to have been stolen. (Title 18, United States Code, §659).

COUNT TWO

On or about and between May 23, 1973 and July 23, 1973, within the Eastern District of New York, the defendant, LAWRENCE ALFANO, did wilfully and unlawfully receive and have in his possession approximately three Air Transport Association airline tickets numbered 8214-939-194, 8214-939-195 and 8214-939-196 having a value in excess of One Hundred Dollars ($100), which goods had been stolen from Wings and Wheels Express Inc. while moving as a part of and constituting an interstate shipment of freight from Nashville, Tennessee to Newark, New Jersey, the defendant, LAWRENCE ALFANO, knowing the same to have been stolen. (Title 18, United States Code, §659).

A TRUE BILL.

Arthur E. [illegible]

FOREMAN

UNITED STATES ATTORNEY

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Filed
2/10/75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA

-against-

LAWRENCE ALFANO,

Defendant.

-----------------------------------X

Indictment 74 Cr. 818
(OGJ)

NOTICE OF MOTION: TO DISMISS INDICTMENT; SUPPRESS EVIDENCE; FOR FURTHER PARTICULARS; DISCOVERY & INSPECTION; EXCULPATORY MATERIALS.

PLEASE TAKE NOTICE that, upon the indictment herein, upon the annexed affidavit of Jonathan L. Rosner, Esq., sworn to the 3rd day of February, 1975, and upon all prior proceedings herein, the undersigned will move this Court, before Honorable Orrin G. Judd, United States District Judge, in Courtroom 11, United States District Court for the Eastern District of New York, United States Courthouse, 225 Cadman Plaza West, Brooklyn, New York, on the 21st day of February, 1975, at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order:

Dismissing the indictment and each count contained therein, pursuant to Rule 12, F.R.Crim.P.;

Directing the United States to furnish a Bill of Particulars, pursuant to Rule 7, F.R.Crim.P.;

Suppressing evidence obtained by illegal means, pursuant to Rule 41, F.R.Crim.P.

Directing the United States to afford Defendant discovery and inspection of certain tangible objects, pursuant to Rule 16, F.R.Crim.P.; and, Directing the United States to furnish all exculpatory materials, pursuant to Brady v. Maryland, 373 U.S. 83, and subsequent decisional law thereon;

and for such other and further relief as to the Court seems just and proper.

Yours, etc.,

ROSNER ROSNER & McEVOY
Attorneys for Defendant
6 East 43rd Street
New York, New York 10017
(212) 661-2150

TO: HONORABLE DAVID G. TRAGER
United States Attorney
Attorney for the United States
United States Courthouse
225 Cadman Plaza West
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------X
:
UNITED STATES OF AMERICA :
: Affidavit In Support of Omnibus Motion.
-against-
:
LAWRENCE ALFANO, :
Defendant. :
:
-----------------------------------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JONATHAN L. ROSNER, being duly sworn, deposes and says:

1. I am an attorney admitted to engage in the practice of law before this Court, am a member of the firm of Rosner Rosner & McEvoy, attorneys for the Defendant herein, and respectfully submit this affidavit in support of an omnibus motion, seeking dismissal of the indictment, suppression of evidence, further particulars, discovery and inspection and exculpatory materials.

2. Indictment. The indictment herein, on information and belief, was filed on or about December 26, 1974. The said indictment contains two (2) counts, each allegeing a substantive violation of 18 U.S.C. § 659, and each count alleges a violation of 18 U.S.C. § 659 save only for different identification of the "goods" alleged to have been received and possessed after the same were stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

Thus, Count One alleges that the Defendant Lawrence Alfano received and possessed two (2) airline tickets between April 25, 1973 and June 25, 1973, which were stolen from interstate commerce, knowing the same to have been stolen from interstate commerce, and Count Two alleges that the Defendant Lawrence Alfano received and possessed three (3) airline tickets between April 25, 1973 and June 25, 1973, which were stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

3. Dismissal of the Indictment. It is respectfully submitted that the indictment herein is fatally defective in a number of particulars, and must be dismissed.

In the first place, the statute violation of which is alleged in both counts of the indictment reaches only such goods as are stolen from

> "any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any air craft, air terminal, airport, aircraft terminal or air navigation facility . . . ."
> 18 U.S.C. § 659 (as amended 1966).

The face of the indictment merely asserts that the "goods" were stolen from a shipment moving in interstate commerce from one designated location to another, but nowhere alleges that the goods were stolen from one or more of the specified sites. As the Court observed in United States v. Cohen, 274 Fed. 596, 598 (3rd Cir. 1921);

> "To sustain the conviction . . . it was necessary that the indictment should charge and the evidence establish that the [goods] was stolen from one of the particular places mentioned in the statute.". Ibid.

Doubtless there is decision law to the contrary, see, e.g., United States v. Spivey, 448 F.2d 390 (4th Cir. 1971), and cases cited therein, but where, as here, there is a specific factual standard for federal jurisdiction, the better rule seems to be asserted in United States v. Manuszak, 234 F.2d 421 (3r Cir. 1956), where the Court reversed a conviction on an indictment under 18 U.S.C. § 659, observing that

> "[n]owhere in the language of [a] count . . . can allegations be found specifying the place or facility from which the goods were taken." Id. at 423.

Thus, at least as to that count, the Court concluded that "the count is a nullity as a charge of a federal crime and should be quashed." Ibid.

Beyond that jurisdictional defect, however, the indictment suffers as well from the complementary defects of duplicity and multiplicity, in its factual as well as its legal assertions. Thus, for example, each count alleges that the Defendant Alfano "did wilfully and unlawfully receive and have in his possession" the goods alleged to have been stolen within the contemplation of the statute. Section 659 of Title 18, United States Code, proscribes a series of acts as violations of federal law, including the embezzlement, stealing, taking, carrying away, concealment, purchase, receipt or possession. Decisional law compels the conclusion that each alleged act is a separate and distinct violation of federal law, and the allegation in one count of an indictment setting forth two or more of the proscribed acts requires dismissal of the indictment for duplicity. See, e.g., United States v. Meduri, 457 F.2d 330 (2d Cir. 1972); United States v. Cusumano, 429 F.2d 378 (2d Cir. 1970); United States v. Jackson, 422 F.2d 975 (6th Cir. 1970); [illegible] v. United States, 370 F.2d 147 (8th Cir. 1967).

Moreover, each count charges the receipt and the possession of identical goods,--airline tickets,--during the identical period of time,--April 25, 1973 to June 25, 1973. Count One alleges receipt and possession of two (2) airline tickets, while Count Two alleges receipt and possession of three (3) airline tickets. Thus, it is respectfully submitted that the Government, in drafting the indictment, seemingly sought to straddle the ultimate question in respect of the number of crimes to be charged, neither setting forth all five (5) airline tickets alleged to have been received and possessed during the same period of time in one count, nor setting each ticket as a separate crime in five (5) distinct counts. As the Supreme Court noted,

> "[t]he distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' *Wharton's Criminal Law*, 11th ed., §34. Or as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . . If the latter, there can be but one penalty." *Blockburger v. United States*, 284 U.S. 299.

On the face of this indictment, the Government has apparently sought to "have it both ways", including receipt *and* possession of *multiple* tickets in each count, but *not* including *all* tickets allegedly received *and* possessed during the same time period in but one count. Thus, to paraphrase the Court in *Blockburger*, *supra*, either "the individual acts are prohibited",--which would seemingly mandate five (5) counts,--or the "course of action" is prohibited, in which case the indictment should contain one (1) count. Thus, for example, without knowing more, if "ownership" of the goods resided in different parties, a separate crime might well be appropriate for each separate ownership, *Oddo v. United States*, 171 F.2d 854 (2d Cir. 1949), but here identity of ownership is in fact alleged. On the other hand, if each taking, receipt or possession were separate and distinct, it might well be the basis for separate counts, but the indictment offers no guidance in that regard. United States v. DeNormand, 149 F.2d 622 (2d Cir. 1945).

These defects raise yet another problem of constitutional proportions, for the indictment as drafted in fact would "allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment." Russell v. United States, 369 U.S. 749, 770. As such, the indictment violates the Defendant Alfano's rights to due process of law. See also, Stirone v. United States, 361 U.S. 212; Ex Parte Bain, 121 U.S. 1; United States v. Silverman, 430 F.2d 110 (2d Cir. 1970); Gaither v. United States, 413 F.2d 1061 (D.C.Cir. 1969).

In light of the foregoing, it is respectfully submitted that the Court should enter an order dismissing the indictment, upon any one or all of the grounds hereinabove referred to.

4. Suppression of Evidence. On information and belief, the Government is in possession of recordings of conversations in which the Defendant Alfano participated obtained as a consequence of surreptitious electronic surveillance. On information and belief, included in those recordings, are recordings of conversations obtained as the consequence of indiscriminate electronic surveillance of a telephone located in the Defendant Alfano's place of business at 53-57 Metropolitan Avenue, Brooklyn, New York, at Telephone Numbers 382-9888 and 382-9889, among others. (See Exhibit "A" annexed hereto). Additionally, on information and belief, the Defendant Alfano appeared and testified be-

fore a Grand Jury sitting in the Supreme Court of the State of New York, County of Kings, and such testimony was obtained as a consequence of the Defendant Alfano being granted immunity under the laws of the State of New York.*

The Defendant Alfano is seeking production of any and all recordings and transcripts of recordings, as well as copies of any and all orders and documents used to obtain orders authorizing such recordings, and for production of any and all statements he may have made. (See Schedule "B", annexed hereto).

Subsequent to receiving the foregoing discovery sought, the Defendant Alfano will be better able to amplify the instant application to suppress evidence, including the recordings and the statements he made to the Grand Jury as aforesaid, as well as any evidence obtained by the use of those means.*

5. Bill of Particulars. While the Defendant Alfano seeks dismissal of the indictment, on the assumption that the application for dismissal is denied, the Defendant further moves for an order directing the Government to furnish further particulars with respect to the charges set forth in the indictment. (See Schedule "A" annexed hereto for the detailed particulars sought).

In United States v. Spivey, supra, in which the

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* Chronologically, the Defendant Alfano and others apparently appeared before the Grand Jury that returned the instant indictment in or about February, 1974, some seven (7) months after the installation and one (1) month after the removal of the telephone surveillance as set forth in Exhibit "A" annexed. His immunized testimony before the State Grand Jury came some four to five months thereafter, and appears to be the only independent intervening act subsequent to the federal Grand Jury investigation and prior to the indictment. Clearly one of the implications in this pattern is that materials obtained by state authorities under grant of immunity were turned over to the federal authorities and directly or indirectly form a basis for the indictment herein.

Court concluded omission of the sites of the thefts as not jurisdictional, the Court did observe that lack of specificity as requested might appropriately be cured by detailed particulars. Of course, the determination of particulars sought is within the sound discretion of the Court, to prevent surprise and the enable the defendant to prepare to meet the charges, in the particular circumstances of the prosecution. United States v. O'Connor, 237 F.2d 466 (2d Cir. 1956); United States v. Sermon, 218 F.Supp. 871 (D. Mo. 1963). Where, as here, the indictment merely tracks the statutory language, and does so in a fashion that leaves open to question compliance with the due process provisions of the United States Constitution, see paragraph "3", supra, even greater liberality in directing particulars should be exercised. See, e.g., Steffler v. United States, 143 F.2d 772 (6th Cir. 1944). See also, United States v. Salazar, 485 F.2d 1272 (2d Cir. 1973). It is respectfully submitted that the particulars sought herein are most appropriate in light of the foregoing. See, United States v. Roberts, 264 F.Supp. 622 (S.D.N.Y. 1966); Case v. United States, 6 F.2d 530 (9th Cir. 1925); United States v. Hopkins, 290 Fed. 619 (5th Cir. 1923).

In light of the foregoing, it is respectfully requested that the Court direct the Government to furnish the particulars detailed in Schedule "A" annexed hereto.

6. Discovery & Inspection. It is respectfully submitted that each item sought to be discovered as set forth in Schedule "B" annexed hereto falls squarely within the provisions of Rule 16, F.R.Crim.P., and should be granted.

7. Exculpatory Material. Under the authority of Brady v. Maryland, 373 U.S. 83, and its subsequent interpretations and applications, the Defendant Alfano is entitled to receive from the Government not only evidence which is material to guilt or punishment of an exculpatory nature, but as well information which will lead to such evidence, or materials bearing upon the credibility of significant prosecution witnesses, and evidence or information which will lead to evidence which "might well have nurtured , even generated, a reasonable doubt as to guilt." Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964). See also, Levin v. Katzenbach, 363 F.2d 287 (D.C.Cir. 1967); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); United States Ex Rel. Meers v. Williams, 326 F.2d 183 (2d Cir. 1964); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968); Luna v. Beto, 391 F.2d 329 (5th Cir. 1967). And, of course, these materials must be made available to the Defendant sufficiently in advance of trial of the action to enable him to utilize the same and pursue any and all leads afforded him by such production. See, United States v. Kelly, 420 F.2d 26 (2d Cir. 1969).

JONATHAN L. ROSNER

Sworn to before me this
3rd day of February, 1975.

ANN E. FERRER
Notary Public, State of New York
No. 31-6278190
Qualified in New York County
Commission Expires March 30, 1976

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF KINGS

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-----------------------------------------------X
                                               :
          IN THE MATTER
                                               :
               OF
                                               :
NOTICE OF AN EAVESDROPPING WARRANT                      NOTICE
AUTHORIZING INTERCEPTION OF COMMUNICA-         :
TIONS OVER TELEPHONE INSTRUMENTS NUMBERS              PURSUANT TO SECTION
                                               :      700.50 SUBD. 3. C.P.L.
497-9617, 456-9551, 382-9888, 382-9889,
                                               :
497-9617, 381-6785, 366-9545, 456-9629,
                                               :
326-7379.
                                               :
-----------------------------------------------X
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YOU ARE HEREBY NOTIFIED that pursuant to Court Order an Eavesdropping Warrant was issued authorizing the interception of telephonic communications and conversations on the hereinafter mentioned telephone instruments.

1. 497-9617 Issued by Justice HYMAN BARSHAY for such period commencing on the 14 day of May, 1973 and terminating on the 10 day of July 1973.

2. 465-9551 Issued by Justice IRWIN BROWNSTEIN for such period commencing on the 10 day of July 1973 and terminating on the 7 day of September 1973.

3. 382-9888, and 382-9889 Issued by Justice HENRY MARTUSCELLO for such period commencing on the 14 day of June 1973 and terminating on the 10 day of December, 1973.

4. 497-9617 Issued by Justice HYMAN BARSHAY for such period commencing on the 19 day of November 1973 and terminating on the 15 day of February 1974.

5. 383-6785 Issued by Justice HYMAN BARSHAY for such period commencing on the 6 day of December 1973 and terminating on the 4 day of January 1974.

EXHIBIT "A"

.../

6. 366-9345 Issued by Justice HYMAN BARSHAY for such period of time commencing on the 17 day of December 1973 and terminating on the 15 day of January 1974.

7. 456-9629 Issued by Justice HYMAN BARSHAY for such period of time commencing on the 14 day of December 1973 and terminating on the 18 day of May 1974.

8. 326-7379 Issued by Justice HYMAN BARSHAY for such period of time commencing on the 4 day of January 1974 and terminating on the 7 day of February 1974.

YOU ARE FURTHER NOTIFIED that during the above mentioned period of authorized eavesdropping conversations were in fact intercepted and overheard.

Dated: Brooklyn, New York

1974

EUGENE GOLD
District Attorney
Kings County

SCHEDULE A

Particulars

I. As to each of the tickets referred to in Counts One and Two of the Indictment, separately set forth:

- A. The approximate date and time when it will be alleged the Defendant received and possessed the ticket;
- B. The approximate place where it will be alleged the Defendant received and possessed the ticket;
- C. From whom it will be alleged the Defendant received the ticket;
- D. The alleged value of each ticket
    - 1. at the time of the alleged theft;
    - 2. at the time of the alleged receipt and possession;
- E. Whether it will be alleged the Defendant paid any consideration for the ticket;
    - 1. If it is alleged the Defendant paid any consideration for the ticket, set forth the amount of such consideration paid;
    - 2. Set forth to whom it is alleged the Defendant paid such consideration;
- F. Whether the true value of the ticket appeared on the face thereof
    - 1. at the time of the alleged theft;
    - 2. at the time of the alleged receipt and possession;

G. Set forth whether it will be alleged the Defendant

  1. Sold the said ticket, and if so

    a. set forth the amount for which it is alleged the Defendant sold the ticket;

    b. to whom it is alleged the Defendant sold the ticket;

  2. Used the ticket for his own benefit or for the benefit of others;

H. With respect to the alleged theft of the ticket,

  1. Set forth when it is alleged the ticket was stolen;

  2. Set forth from where it is alleged the ticket was stolen;

  3. Set forth whether it is alleged the Defendant, directly or indirectly, stole the ticket;

I. Set forth what agency or institution issued the ticket;

  1. specify the date of issuance;

  2. specify the geographical place of issuance.

SCHEDULE B

Discovery

1. Air Transport Association Airline Tickets
   - A. No. 8213-865-040
   - B. No. 8213 865-044
   - C. No. 8214 939-194
   - D. No. 8214 939-195
   - E. No. 8214 939-196
2. All other Air Transport Association Airline Tickets which the Government intends to offer in evidence on trial.
3. Any and all tape, wire and other recordings howsoever made, including duplicate originals and transcripts thereof, of any and all conferences, conversations and talks to which the Defendant was or is alleged to have been a participant;
   - A. Where any such recordings were made pursuant to prior judicial authorization, copies of all Orders authorizing such recordings and copies of all papers submitted to the judicial officer issuing each such Order;
   - B. All instruments, machines and other mechanical devices utilized to make such recordings, identifying in each instance which instrument, machine and mechanical device was utilized to make each such recording.
4. The results of each and every physical examination or other scientific test or analysis made

by the Government or any other person or agency at the request of the Government, either during, as a consequence of or arising out of the investigation leading to the indictment herein, including but not limited to fingerprint analysis, voice analysis, parafin tests, and every other physical examination or physical or scientific test.

5. Any and all written and recorded statements by the Defendant within the possession, custody or control of the Government, the existence of which is known or by diligence may become known to the Government.

6. Recorded testimony of the Defendant before a Grand Jury.

2/14/75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------------------------------x

UNITED STATES OF AMERICA

-against-

LAWRENCE ALPARD,

Defendant.

----------------------------------x

Indictment 74 Cr. 814
(OCS)

SUPPLEMENTAL AFFIDAVIT:
OMNIBUS MOTION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JONATHAN L. ROSNER, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court, am a member of the firm that is counsel of record for the Defendant herein, and submit this affidavit in compliance with Rule 3(c), Criminal Rules of this Court.

2. I have conferred with the Assistant United States Attorney handling the prosecution of this matter and have been informed by Mr. Cunningham that the Government will consent to furnish those items of particulars sought by the instant motion which are detailed in Schedule A annexed to the moving papers, will furnish discovery of the tangible objects detailed in Schedule B annexed to the moving papers, including the papers supporting the order countenancing the electronic surveillance conducted of the Defendant, and will supply to the Defendant the so-called Brady material requested.

3. The Government has further indicated that it would prepare papers in opposition to the motion seeking dismissal of the indictment herein and I advised Mr. Cunningham that our firm would have no objection to any reasonable request for an adjournment to enable him to prepare opposing

On herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me this day of 19

papers.

4. The motion is presently noticed for argument for February 21, 1975.

JONATHAN L. ROSNER

Sworn to before me this
12th day of February, 1975.

Ann E. Ferrer

ANN E. FERRER
Notary Public, State of New York
No. 31-6278130
Qualified in New York County
Commission Expires March 30, 1976

FILED
IN CLERK'S OFFICE
U S DISTRICT COURT E.D. N.Y.
☆ JUL 21 1975 ☆
TIME A.M. ....
P.M. ....

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA :

-against- :

LAWRENCE ALFANO, :

Defendant. :

-----------------------------------x

Docket No. 75 CR. 298
(O.G.J.)

SUPPLEMENTAL AFFIDAVIT:
SUPPRESSION OF EVIDENCE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JONATHAN L. ROSNER, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this Court and am the attorney of record for the Defendant Lawrence Alfano. I respectfully submit this affidavit in further support of a motion, pursuant to Rule 41, F.R.Crim. P., to suppress for use as evidence, materials and evidence obtained by the Government as a consequence of illegal and surreptitious searches and seizures.

2. Indictment. The original indictment herein, 74 Cr. 816, was filed on or about December 26, 1974, and charged the Defendant Alfano in two (2) counts with the illegal receipt and possession of five (5) airline tickets which were stolen from a shipment moving in interstate commerce. 18 U.S.C. §659.

While there was pending before the Court an omnibus motion brought on behalf of the Defendant seeking dismissal of the indictment, further particulars, discovery, suppression of evidence and exculpatory materials, a superceding indictment was returned. That indictment, 75 Cr.

298, filed on or about April 15, 1975, similarly contains two (2) counts, each alleging a violation of 18 U.S.C. §659, involving the receipt and possession of five (5) airline tickets allegedly stolen from a shipment moving in interstate commerce.

3. Disposition of Motions, etc. The Government filed no responsive papers to the Notice of Motion returnable February 21, 1975, seeking dismissal of the Indictment, further particulars, discovery and inspection, and exculpatory materials, nor did the Government submit any papers in response to the Notice of Motion returnable May 9, 1975, seeking further particulars and discovery and inspection.

In the interim, the Government did furnish what purports to be a Bill of Particulars under letter dated April 22, 1975, and as well furnished copies of the five (5) airline tickets which are the subject of the two (2) counts of the Indictment, as well as copies of the documentation allegedly establishing the interstate character of the shipments from which the tickets were allegedly stolen. In addition, the Government furnished to the Defendant a copy of his testimony before the Grand Jury that returned the indictment and a copy of an eight (8) page transcript of an eavesdropped conversation overheard and apparently recorded on August 7, 1973, at Telephone No. 497-9408 where the participants to the conversation were "Larry", "June" and "Vinnie".

Additionally, the Government furnished what purports to be copies of all relevant Eavesdrop Orders or Warrants and applications in connection therewith, which indicate the existence of twelve (12) such Warrants or Orders, including three (3) in Suffolk County and nine

(9) in Kings County, as follows:

1. Order of Supreme Court, Suffolk County dated 9/22/72 for LF 9-1547

   Affidavit of George Aspland, Esq., sworn to 9/21/72

   Affidavit of Peter Loughlin, sworn to 9/21/72

2. Order of Supreme Court, Suffolk County dated 11/4/72 for 421-3422

   Affidavit of George Aspland, Esq., sworn to 10/3/72

   Affidavit of Peter Loughlin, sworn to 10/2/72

3. Order of Supreme Court, Suffolk County dated 10/20/72 for 261-0988

   Affidavit of George Aspland, Esq., sworn to 10/ /72

   Affidavit of Peter Loughlin, sworn to 10/19/72

4. Order of Supreme Court, Kings County dated 1/26/73 for 638-9048

   Affidavit of Eugene Gold, Esq., sworn to 1/25/73

   Affidavit of Thomas Fitzgerald, sworn to 1/25/73

5. Order of Supreme Court, Kings County dated 2/23/73 for 638-9048

   Affidavit of Eugene Gold, Esq., sworn to 2/23/73

   Affidavit of Thomas Fitzgerald, sworn to 2/23/73

6. Order of Supreme Court, Kings County dated 2/ /73 (Unsigned) for 770-5500

   Affidavit of Eugene Gold, Esq., sworn to 3/13/73

   Affidavit of Thomas Fitzgerald, sworn to 3/13/73

7. Order of Appellate Division, Second Department, Supreme Court, dated 4/11/73 for [illegible]

8. Order of the Appellate Division, Second Department, Supreme Court, dated 5/ /73 (Unsigned) for 779-1580

Affidavit of Eugene Gold, Esq., sworn to 5/10/73

Affidavit of Thomas Fitzgerald, sworn to 5/10/73

9. Order of Supreme Court, Kings County dated 5/22/73 for 497-9617

Affidavit of Eugene Gold, Esq., sworn to 5/22/73

Affidavit of William F. Carney sworn to 5/22/73

10. Order of Appellate Division, Second Department, Supreme Court, dated 6/14/73 for 382-9888 and 382/9889

Affidavit of Eugene Gold, Esq., sworn to 6/14/73

Affidavit of William F. Carney, sworn to 6/13/73

11. Order of Appellate Division, Second Department, Supreme Court, dated 7/ /73 (Unsigned) for 382-9888 and 283-9889

Affidavit of Eugene Gold, Esq., sworn to 7/ /73 (Unsigned)

Affidavit of William F. Carney, sworn to 7/6/73

12. Order of Appellate Division, Second Department, Supreme Court, dated 9/13/73

4. [illegible] On May 9, 1973, together with counsel for the Government and counsel for other defendants whose [illegible] out of the chain of eavesdropping warrants and orders outlined above, I appeared before the Court [illegible] the several motions to suppress. [illegible] of the material [illegible] information with respect to the [illegible] specifications are not furnished to the Government until the [illegible] of the [illegible]. [illegible] the [illegible]

respect of the motions to suppress,* the Court indicated that the Defendant Alfano lacked the requisite standing in respect of any and all conversations, warrants, orders, and applications prior to those numbered "10.", "11." and "12." above, since only those warrants, orders and the applications incidental to them revealed conversations to which the Defendant Alfano was a participant, and only the one numbered "11." had to do with the single conversation of the Defendant Alfano that the Government intended to offer into evidence. Moreover, the Court further indicated that as the orders, warrants and applications appeared sufficient on their face, and since another member of this Court had presumably found the eavesdropping lawful in related matters, absent a demonstration on the part of the Defendant Alfano and other defendants similarly situated, the Court would not conduct an evidentiary hearing.

It is, of course, too late in the day to conclude, as the Court did, that the Defendant Alfano has no standing to challenge the earlier eavesdrop procedures which were the derivations for the procedures bottoming the challenged conversations offered against him. See, e.g., Nardone v. United States, 308 U.S. 338, Silverman v. United States, 365 U.S. 505. See also, American Bar Association Standards Relating to Electronic Surveillance §2.3 at page 135, United States v. Giordano, 94 S.Ct. 1820.

Moreover, the materials furnished by the Government fairly indicate extended gaps in the surveillance and as well indicate applications and order which do not on their face appear to have been signed. In addition, it is respectfully submitted that certain of the applications afford a neutral and detached magistrate no basis on which to issue the orders or warrant requested since the predicate for reliability of the information on which the application is based is set forth in only the most conclusory fashion. In addition, certain of the orders in the chain, viz., numbers "3.", fairly indicate an indiscriminate eavesdropping without the sufficient foundation required constitutionally. Even beyond that, many of the applications appear facially to be mere repetitions of prior applications, and neither the applications nor the orders give any indication that appropriate protective procedures, such as minimization, were adopted. Finally, the extensive nature of the continuing search and seizure, conducted over a period of in excess of One (1) year raise serious questions as to the constitutionality of the conduct.

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* The Court denied Defendant's motion to dismiss and also [illegible] [illegible] particulars, although [illegible]

At the conclusion of the "hearing" on May 9, 1975, the Court indicated it would hear counsel further in respect of particularization of claims arising out of the warrants, orders and applications, on May 15, 1975 at 2:30 P.M. As I indicated at that time, I am actually engaged in trial in Supreme Court of the State of New York, County of New York, before Honorable [illegible] in [illegible] Calendar Part [illegible] Thursday, May 15, 19[illegible] [illegible]

15, 1975, and will thus be unable to attend the Court on May 15, 1975 at 2:30 P.M.

In light of the foregoing, and the rulings of the Court in respect of the motion to suppress on behalf of the Defendant Alfano, I will respect the rulings of the Court both as to suppression, particulars and discovery, letting the record stand as it presently does, and indicate to the Court that I am not in a position to prepare further for trial. Thus, the Court may indicate as it desires a date for trial consistent with my other trial commitments.

JONATHAN L. ROSNER

Sworn to before me this
12th day of May, 1975.

[illegible]
Notary Public, [illegible] of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires [illegible]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-------------------------------x

UNITED STATES OF AMERICA

-against-

PHILIP ALBERGO and
LORRAINE ZENKEWRICH,

Defendants.

74 CR 819
74 CR 821

-------------------------------x

United States Courthouse
Brooklyn, New York

May 15, 1975
2:00 o'clock P.M.

Before:

HONORABLE ORRIN G. JUDD, U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MILES CUNNINGHAM, ESQ.
Assistant U.S. Attorney

GEORGE MEISSNER, ESQ.
Attorney for Defendant Albergo

DONALD KLEINBERG, ESQ.
Attorney for Defendant Zenkewrich

THE CLERK: Criminal cause for hearing, United States of America versus Philip Albergo and Lorraine Zenkewrich.

MR. CUNNINGHAM: I wish to apologize to the Court. Unfortunately, I was before Judge Bartels on what I assumed to be a five-minute pleading.

THE COURT: We will do what we can this afternoon. It is only Albergo and Zenkewrich that are here this afternoon?

MR. MEISSNER: We are the only ones that accepted your Honor's invitation.

THE COURT: The problem on both of them is how far we can go on the wiretap order. There does not seem to be any need to go beyond the first order that contains the conversation of the particular defendant.

MR. KLEINBERG: Your Honor, are we going to address ourselves to the aspects of the wiretap hearing?

THE COURT: I should think we might do that.

MR. KLEINBERG: Very well.

THE COURT: If the wiretaps are not valid, then there is nothing to try with respect to the Fence witnesses.

MR. KLEINBERG: All right, I think with respect to the wiretap hearing, I myself in addressing the wiretap conversations on the phone which dealt with the conversations overheard as to Mrs. Zenkewich, with respect to that I have two applications to make:

One, in respect of the fact that it was a duty upon the prosecuting agency at that time, which was a State agency, to amend the wiretap order to include the crime of possession of stolen property. The order up until that point dealt just with gambling, and they extended the order from June to July, when they had this overheard.

I do not know how far the conversation would go back when they heard conversation relating to stolen airline tickets or other things mentioning contraband, but they proceeded to get another wiretap order and did not address themselves in that order to any of the illicit conversations dealing with stolen airline tickets.

THE COURT: What about that?

MR. CUNNINGHAM: I think there are many cases. I did not know this application was going to be brought and I apologize for not having the cases.

THE COURT: You gave me a memorandum on all the others.

MR. CUNNINGHAM: This is a brand new one. There are many cases which say a police officer does

BEST COPY AVAILABLE

not have to be the United States Supreme Court in being able to immediately ascertain what he hears is a crime being committed.

In this case we are dealing primarily with gabmling and with racketeering and there was a conversation -- to an untrained ear would sound like someone was ordering airline tickets.

THE COURT: I have a list somewhere, either 12 or 13 wiretap orders. Number 9 is the order of May 22, 1973, on which conversations of File were overheard.

MR. MEISSNER: When your Honor is referring to number 9, we do not have any numbers.

THE COURT: Somebody gave me a list of twelve numbers.

MR. MEISSNER: Is that your list? We are working with a list provided by Mr. Cunningham.

MR. CUNNINGHAM: We are all using the same list.

THE CLERK: There were no numbers on the list. This is my xerox of your yellow sheet. I just arbitrarily gave them a group of numbers.

THE COURT: Let us put them down as I have them.

Number 1 is the First Veterans Construction Corp. court order of September 22, 1972 in Suffolk County.

Number 2 is the Natali order in Suffolk County of October 4, 1972.

Number 3 is the Drolett order in Suffolk County of October 20, 1972.

Number 4 is the Nestar order of Judge Barshay of January 26, 1973.

Number 5 is the Nestar extension of Judge Brownstein, February 21, 1973.

Number 6 is Sonny's Car Service, order of Justice Rabin in March of 1973 -- I guess March 13th.

Number 8 is Sonny's Car SErvice extension of Justice Raybin --

MR. MEISSNER: I think your Honor skipped 7.

THE COURT: That is the first extension of Sonny's Car Service.

Number 8 is the second Sonny's Car Service extension of Justice Raybin of May 10, 1973, and

Nine is Justice Barshay's order on the Bushwick Democratic Club, May 22, 1973.

Number 10 is Judge Marticello's order of June 14, 1973 on the Crossroad's Lounge.

Number 11 is the extension of the Crossroad's Lounge order of July 9, 1973,

and Number 12 is the extension of the Crossroad's Lounge order on August 13, 1973.

Then we have a series of orders sealing the records and postponing of giving of information.

Since Philip Albergo does not appear before number 9, I thought if we went back to number 8, we'd go far enough?

MR. CUNNINGHAM: If I could respond once more to the defendant Zenkewich's first motion, that the police department should have asked for a new order to include stolen property.

I might quote from the defendant's own brief wherein he states:

"The most that one can infer from that conversation is that the party named Philip obtained tickets for Lorraine. There is nothing on the face of that to appear illegal. A police officer who was investigating racketeering and gambling would assume that they are dealing with stolen airline tickets."

MR. MEISSNER: Your Honor, if that is the argument, then I would like to move at this time to dismiss the indictment, because if that is the case then no reasonable person could infer a crime was committed and the indictment on its face does not state a cause of action.

THE COURT. Motion denied.

MR. KLENBERG: The basis upon which the questions were asked in the grand jury, the predicate of the questions, are derived from a wiretap --

MR. CUNNINGHAM: Are we through with that point?

MR. KLEINBERG: Not at all.

THE COURT: He is on the same point.

MR. KLEINBERG: The questions were derived from the wiretap and the law seems to be clear that in order to violate one's rights under the Fourth Amendment, there has to be certain protective measures taken, and of course you have orders for wiretaps whereby an objective-independent person, a judge -- in this case, your Honor, can make the determination.

The interception of the conversations dealing with gambling were overheard and taken down. Thereafter, and I do not know how many conversations were heard besides the one I have in my possession that was given to me by Mr. Cunningham, that might have dealt with contraband and stolen property. There were three or four conversations that dealt with this material, which is the basis -- the basis of the transcripts which were given to me by Mr. Cunningham. My position is clear and I think this Court would have to be bound by New York State law.

I believe the Federal cases indicate once an interception be made with respect to a wiretap, that if that wiretap was made by state law enforcement officials the Court would have to address itself to the law of the state.

New York State law is very clear on this. People v. Si Stefano, 45 Appellate 2nd. Once conversations are overheard which are not in the proscription of that wiretap order, it is incumbant upon the prosecuting officer to go to a Court as quickly as possible -- some Courts made it four days, some seven -- to amend the order to include those conversations.

That order has not been amended to include those conversations and those conversations thereafter obtained would be suppressed.

I would say if those conversations are suppressed there is no case before this Court.

MR. CUNNINGHAM: In response to that, I would cite when the police officers knew that they were dealing with stolen tickets,counsel might be right. In counsel's own words, you cannot have it both ways. He is saying the only thing that could be inferred from the telephone conversation is that a person by the name of "Philip" was ordering tickets from a girl named "Lorraine," and that's right out of the defendant's brief.

He cannot argue one way in his brief and another way in oral argument. He has to make his choice.

MR. KLEINBERG: I beg to differ with counsel with respect to that. Be that as it may. All that I am indicating is the facts as they are before the Court and the facts as they were. I have no idea what was before any law enforcement official.

THE COURT: Do you have the whole transcript of the Albergo conversation that is involved here?

MR. CUNNINGHAM: Yes, your Honor.

THE COURT: When do you say they should have gotten their amended order?

MR. KLEINBERG: I do not know. I was asked for a hearing to determine that. I have no idea how far back those conversations go, what they picked up with respect to listening to those conversations dealing with contraband.

It may even go further than the conversations that we have before us. It was at that point that they were obligated to go before an independent magistrate to get an amendment.

THE COURT: Let me see them.

(Documents handed to Court.)

These are the same ones annexed to the brief?

MR. KLEINBERG: Yes.

THE COURT: These are June of 1973?

MR. KLEINBERG: What I am saying --

THE COURT: Those were under the Crossroads Lounge order.

MR. CUNNINGHAM: The Government is not relying on the wiretap, your Honor. We do not even know about any conversation dealing with stolen tickets, other than at the Crossroads Bar.

MR. KLEINBERG: I don't think that Mr. Cunningha was privied to what took place with the State authorities and their listening into those conversation I would like to ascertain that from all the logs which would be given to me with respect to the conversations.

THE COURT: Is this the first conversation that you know of with Lorraine?

MR. CUNNINGHAM: Correct.

I would like to state for the record, if Mr. Kleinberg is coming here on the eve of trial -- three days before trial and asking to hear the taped conversations of every conversation that came out of there, I would strenuously object on the grounds when this case was first indicted I advised Mr. Kleinberg that there were insurmountable numbers of tapes, and any time he could take the time -- the weeks or months -- to come out and listen to the conversations, I would be more than happy to supply him with all the tapes. That should not be brought up three days before trial.

MR. MEISSNER: May it please your Honor, I think I must interject at this point just to protect the record --

MR. CUNNINGHAM: I would object to any --

THE COURT: Overruled. Go ahead.

MR. MEISSNER: We received the last time we were in this court, which I believe was last Friday, the balance of the wiretap orders.

THE COURT: Those were the Suffolk County orders. They have nothing to do with this.

MR. MEISSNER: No, your Honor. We were also told, I am sure in good faith, -- I know all this was done in good faith -- that Judge Weinstein had already passed on all of these wiretap orders and affidavits.

MR. CUNNINGHAM: That is not correct. That representation was never made.

THE COURT: What Judge Weinstein did was go back from one of the branches on the tree --

MR. MEISSNER: Yes, your Honor, and that branch ended in the narcotics investigation. I read the record -- that part of the record that was supplied to me on Friday and it evidently didn't come to our case at all. In addition --

THE COURT: We are on Zenkewich.

MR. MEISSNER: The same thing would apply to my client.

THE COURT: I will hear about your client later.

MR. MEISSNER: Actually, it would be the same.

MR. KLEINBERG: It's same wiretap.

MR. MEISSNER: The exact same wiretaps for both of us.

THE COURT: The Zenkewich conversations were on a wiretap which related to instruments 988 and 9889 --

MR. KLEINBERG: Correct.

THE COURT: -- which was done for the purpose of getting information on gambling and grand larceny.

MR. KLEINBERG: That is correct.

THE COURT: It happened that they got some other information in connection with it.

MR. KLEINBERG: That is correct. That is my point.

THE COURT: Are you saying they can't use it?

MR. KLEINBERG: That is correct.

THE COURT: Motion denied.

MR. MEISSNER: Without amendment of the order, your Honor?

THE COURT: That is not so.

MR. KLEINBERG: Can I cite some cases with respect to State cases which indicate --

MR. CUNNINGHAM: Excuse me, I think there is some law that says, if the police overhear on a wiretap the commission of what they believe to be an independent crime or a crime for which they do not have authorization to listen, they have two alternatives:

They should either turn the machine off or proceed post haste to have the order amended to include the additional crime.

The Government's position, as far as the case against the two defendants here, is that the police officers had to have good reason to believe that they were hearing evidence of another crime, and from the tape recordings I respectfully submit that the police officers did not know. I think there is a lot of cases to back that position up. They have plenty of time, therefore, to apply for amendment of the order. I don't think they ever realized that they were dealing with stolen tickets as evidenced by the fact Mrs. Zenkewich, when she was questioned by the grand jury over in Kings County, was never asked any questions about stolen airline tickets, nor was the co-defendent, Mr. Albergo, asked any questions about stolen airline tickets.

THE COURT: The question is whether this should have been excluded because of minimization.

MR. CUNNINGHAM: That argument could be raised.

THE COURT: What about that?

MR. CUNNINGHAM: When you get into the argument of minimization, where do you stop and where to you start? That is a full-blown matter. These conversations, as you can see, were only listened to a short period of these conversations, and they turned them off when they thought these conversations were personal and so stated at the bottom of the tapes.

These things were not even transcribed. You will see at the bottom of the tapes the conversations are 6/26/73 only goes to about twelve lines, and then the conversation ends. That was barely enough time for the agents that were listening to the conversation to determine what the conversation was about.

The conversation of 6/28/73 goes about fifteen lines and at which time it says:

" Philly: Oh, nothing, I was just fooling around with the barmaid."

At this time the conversation was cut off. That's when they could determine that the conversation was getting personal.

At the end of 6/25/73:

"Philly : What am I going to do?"

"Lorraine: I have no idea, Philly."

"Philly: What are you going to do?

"Lorraine: Play with myself.

"Philly: Do you want me to call you tonight?"

End of call. Machine shut off.

THE COURT: What does that mean? Does that mean the call ended or the machine was cut off before the call ended?

MR. CUNNINGHAM: I believe they cut the machine off at that time because the conversation got personal.

MR. [illegible]EISSNER: The conversation got personal halfway up that page. They should have cut it off at that point.

THE COURT: They were talking about money, which might have something to do with gambling.

MR. KLEINBERG: My position would be that in order to determine whether the police officer did in fact thing that they were ovarhearing conversations as to contraband, it would be for them to testify under oath. Without their testimony, there is no way I could ascertain that.

THE COURT: I am satisfied.

(continued next page)

MR. KLEINBERG: There is no way the Court can, but obviously the Court has.

I would think without a full-blown hearing, we will not be --

THE COURT: Who do you want at the hearing?

MR. KLEINBERG: The officers that listened to the tapes.

MR. CUNNINGHAM: This case was indicted back in January. There has been several requests for adjournment. We set last week down for anymotions as far as minimization. They had the tapes at that time. They should have made the motion at the time.

MR. KLEINBERG: Again, your Honor, I would like to point out to the Court, Mr. Meissner has already indicated you can't do everything at once. We were supplied with two affidavits and orders. From the first order and affidavit there was the indication that that was dependent upon a prior affidavit and order. As soon as we received it -- in fact, your Honor indicated that the prior order should be supplied.

Your Honor, I am a single practitioner all by my lonesome. I do civil and criminal work. I am not just saying it. To say that we had all the time in the world to review this -- I say most respectfully that we did not. I did the best I could to review the orders. They were only given to us Friday, and I indicated before, there was a full-blown hearing --

THE COURT: I am not deciding on the basis of the time involved. It does seem clear to me that the particular tapes and orders to which you are basing your argument has been available for a long time. I am deciding that the orders were proper and the conversations were properly seized.

MR. MEISSNER: If it pleases your Honor, I would like to point out to the Court that I do not see any possible way, without looking at the logs and without having a hearing to determine when for the first time any information became available to City and State authorities in regard to those airline tickets, that there is no way for us to tell because all we have is the limited transcript involving Albergo and Zenkevrich. They are both exactly the same. I do notice, by the way, that we have a transcript here -- at least I have a copy of a transcript which is for June 13, 1973. Based upon the schedule of the orders that were given to me, the first Crossroads order was signed on June 14, 1973. If that is the case, then we have an illegal tap to begin with, but again I am basing what little knowledge I have on the mere half-legible or half-illegible -- whatever way you want to characterize it -- copies of the transcript of the conversation involving my client and the schedule of the various orders that have been given to us. Without having the logs and without having a hearing, there is no way for me to determine that. But it appears on the face of it that there is an illegal tap to start with.

THE COURT: This is the hearing. What did you subpoena for today?

MR. MEISSNER: Your Honor, I have to --

THE COURT: Read the question back. I want an answer to my question.

(Read.)

MR. MEISSNER: I did not subpoena anything. But it was my understanding that under the law, the United States Attorney has the duty of going forward -- of putting on the witnesses who were involved in those recordings, and that we would have the opportunity to cross-examine.

THE COURT: What witnesses did you ask the Government to have here today?

MR. MEISSNER: On these particular affidavits?

MR. CUNNINGHAM: All of them.

THE COURT: What witnesses did you ask the

Government to have?

MR. MEISSNER: As many as they could produce.

THE COURT: What witnesses did you ask for?

MR. MEISSNER: I assumed we'd start with the first order and go right through.

If your Honor is going to limit --

THE COURT: What witnesses did you ask the Government to have today?

MR. MEISSNER: I didn't ask the Government for anything. We told the Government that we are contesting these orders on the basis that we feel that they were not legal, due to the fact that they were not properly --

THE COURT: They are legal on their face.

MR. MEISSNER: I understand the law to be that the Government has the burden of going forward at a hearing and the production of witnesses --

THE COURT: The Government has the burden of producing the orders.

MR. MEISSNER: On the face of it, your Honor, I have a transcript of June 13, 1973 and I have no order signed for that transcript at the Crossroads, so to assume on the basis of that --

THE COURT: Let me see it.

MR. KLEINBERG: At the time I submitted the brief, the transcript which I have annexed to the brief, was the only transcript which was supplied to me by Mr. Cunningham. I didn't have that before me.

THE COURT: Let me see it.

MR. MEISSNER: This was given to us after the session when we went upstairs with Mr. Cunningham.

MR. CUNNINGHAM: In response to this whole argument, I think the rulings are specific. If you wish to attack a warrant, you should give the Government notice in writing as to what you wish to attack. This is the first time that we have heard about an order in the possession of the defendants for four weeks now -- now he brings it up for the first time?

MR. MEISSNER: What was in the possession of the defendants? We received that last Friday.

MR. CUNNINGHAM: I am not talking about that.

THE COURT: What about this June 13th transcript?

MR. CUNNINGHAM: Your Honor, to be perfectly candid with the Court, I don't know where that came from. I assume this was a tap on the 13th and the order wasn't signed until the 14th. It probably should be suppressed. I would like to be given an opportunity to go up and look at the tapes. It might be a typographical error on the transcript.

THE COURT: If the application was made on the 13th, they may have gone ahead having been submitted to the Judge.

MR. CUNNINGHAM: I have another copy of this where there are some corrections made on the tape and it says the 13th and that has been crossed out and the 15th has been written in on the tape and instead of being "Elaine" it states it's for "Lorraine."

THE COURT: Do you have the reel?

MR. CUNNINGHAM: Yes, upstairs.

THE COURT: Do you have the log here?

MR. CUNNINGHAM: No, I do not have the log.

In all the discovery and pretrial conversations had on this thing, I have told counsel many, many times if anyone wishes to see the logs or hear the tapes, they were more than free to hear them.

I think it is rather inopportune to come in here on the eve of trial and hear all the tapes.

THE COURT: If this is a late one --

MR. MEISSNER: We got this Friday. I haven't had a chance to work on it.

MR. CUNNINGHAM: I am talking about the fact that you wish to have permission to look at all the logs and hear all the tapes.

MR. MEISSNER: I do not want to hear the tapes.

I just want to see the logs applicable to these affidavits. I think we could narrow it down to a question of whether or not an amendment was required.

MR. CUNNINGHAM: I could solve this problem fairly easily.

I have a carbon copy of the log of June 15, 1973 and a conversation that took place at 1515, telephone No. 879-3000, Ext. 279 --

MR. MEISSNER: Could I just look at my sheet?

THE COURT: Yes.

MR. CUNNINGHAM: Extension 2795, which was the defendant's extension, and the notation is: "Phil to female about airline tickets personal."

MR. MEISSNER: May it please your Honor, the sheet that I have from the United States Attorney is dated June 13th. It has no phone number on it whatsoever. I don't know if there are two different conversations. If there was one for the 15th, I was never given that.

May I have this marked as an exhibit, your Honor?

THE COURT: Yes.

The statement is that this should be marked the 15th instead of the 13th.

MR. MEISSNER: Mr. Cunningham mentioned there a phone number on his.

MR. CUNNINGHAM: On the log.

MR. MEISSNER: I see.

THE COURT: Mark it.

MR. CUNNINGHAM: If defense --

THE COURT: Wait, one at a time. Mark it.

MR. KLEINBERG: Your Honor, I still think if there is an error like this, I would want to know who the party was that made the notation with respect to the logs, if I may ask?

MR. CUNNINGHAM: I have no idea. Probably the police officer.

THE COURT: Suppose you mark the log?

MR. CUNNINGHAM: Fine, your Honor.

THE CLERK: One-page document is marked Defendant's Exhibit A for identification, headed, "Plant No. 3, June 13, 1973, Reel 1."

MR. CUNNINGHAM: The Government would like to mark as Exhibit 1 for identification, what purports to be a transcript of a conversation on telephone 879-3000, Extension 2795, and what purports to be a telephone conversation on telephone 879-3000, Extension 2795, which is a three-page exhibit, two pages of which purport to be telephone conversation that took place on June 15, 1973. The third page of which purports to be a photocopy of a log of June 15, 1973. That is it.

MR. KLEINBERG: I ask the Court -- maybe I am mistaken -- but I would like to find out who typed in the original June 13th date. I think that is a question that should be asked, if I may?

THE COURT: Mr. Cunningham, do you know who put the 6/13/73 on there?

MR. CUNNINGHAM: No, your Honor. From what I see -- he is looking at the second page of a two-page sheet -- the first page had apparently been corrected to read the 15th.

If the Court would like, I could bring the tape down?

MR. MEISSNER: Why is yours the 15th and mine the 13th?

MR. CUNNINGHAM: I am not too sure that that is not the 15th.

MR. MEISSNER: Your Honor, could we have all of those conversations that were given to us marked so that in that way we know we have all the same sheets?

THE COURT: Yes.

MR. MEISSNER: I am not quite sure that we all have everything that we are supposed to have.

MR. CUNNINGHAM: If I could make a second suggestion? I would be willing to play upstairs for defense counsel, as I played for Mr. Kleinberg, the tapes which would be the best evidence.

THE COURT: Mr. Meissner said he does not want to hear the tapes.

MR. MEISSNER: I am not interested. Mr. Kleinberg has heard them. Right now I am more concerned if there is a tape for June 13th.

THE COURT: Could you get it now?

MR. CUNNINGHAM: Yes, it is right down in my office.

THE COURT: Why don't you send someone to get it? In the meantime, if you want to mark the transcripts that we are discussing, I will be glad to have you do so.

MR. CUNNINGHAM: In the event that the tape shows that these transcripts are strictly a typographical mistake, which shows the 13th rather than the 15th, I think the whole thing might become moot. Might we move on to the next point?

THE COURT: Let me find out from Mr. Meissner, is it true that what you were showed was the second page of a two-page document?

MR. MEISSNER: I was given two sheets by the United States Attorney.

THE COURT: Let me look at it.

MR. KLEINBERG: It is the second page.

MR. MEISSNER: I received them both last Friday and asked Mr. Cunningham, because they didn't indicate phone calls, whether it was an incoming or outgoing call, and I wrote in my own pen "Crossroads incoming or outgoing." I don't remember which.

THE COURT: Wait a minute. Both of these pages refer to plant 3, Reel 1, and the first page does have a phone number and a reference to the persons, so it may perhaps be that one is intended to be a continuation of the other.

Let us wait until we get the tapes.

MR. CUNNINGHAM: I think Mr. Kleinberg heard it.

MR. KLEINBERG: As I indicated, that is not the issue.

THE COURT: I suppose you have an issue for some ultimate decision as to whether the portions of non-pertinent conversations that are heard, whether to determine they are non-pertinent or can be used. I would say if it is pertinent to hear that much, you can use that much.

MR. KLEINBERG: Of course, I do have the motions to dismiss. If we do go to trial, there are a number of conversations which Mr. Cunningham had read one portion of out loud today, which I do not think would be relevant as to the issues before the jury.

THE COURT: That is the point where they cut it off?

MR. KLEINBERG: That's another.

THE COURT: They cut it off right after that?

MR. CUNNINGHAM: I do not know why we are bothering to talk about this. I had a conversation with Mr. Kleinberg no less than twenty-four hours ago where I told him that I would voluntarily cut that off.

MR. KLEINBERG: If you said that, I apologize. My understanding of the conversations that I had with you, and I directed your attention to that, and your response to me was, "Well, if it was ten years ago, all right." That is what I believe you said.

THE COURT: We are going to leave it out?

MR. CUNNINGHAM: We will leave it out.

THE COURT: Now you have a motion to dismiss on various grounds?

MR. KLEINBERG: Yes, your Honor.

I base my first point of the motion on the recent case of Brownstein v. United States, and I indicate in my motion papers that this witness was brought before a grand jury without counsel, and she was asked about -- purportedly -- a conversation which took place ten months before her appearance before the grand jury, and the specific question which was posed to Mrs. Zenkewrich before the grand jury was, "Did you at any time --" let me read it:

"At any time, have you ever ordered airline tickets for yourself --"

THE COURT: What is the whole context in which it was asked?

MR. CUNNINGHAM: It was asked in a very direct manner. They asked whether or not she had ever been -- the conversation started off, "When was the last time you were in the Eastern District of New York?"

And the defendant said, "Last night," and they said, "Why were you in the Eastern District -- where in the Eastern District of New York were you?"

And she answered, "I was at the Crossroads Bar.

"How often do you go there?

"An average of once a week.

"What is your attraction to the Crossroads Bar?

"My boy friend, Philip Albergo.

"How long have you been dating him?

"Approximately two years.

"What is your relationship? Would you characterize it as a love affair?

"That is correct.

"Do you go there frequently?

"That's correct."

Then they asked, "When you were at the Crossroads Bar, had you ever heard anyone talk about airline tickets?

"No."

Then skipping fromthere, "Have you in this period of time taken airline trips?

"No.

"Has any member of your family?

"No.

"Do you have a girl friend by the name of Marsha?

"Yes.

"Have you ever ordered airline tickets for anyone --"

Well, I should not try and characterize the record. I think the record should speak for itself.

THE COURT: That may be enough to show that that did not necessarily mean --

MR. KLEINBERG: The reason why Mr. Cunningham so generously says he does not want to characterize the record is because before that question was asked -- let me start at the beginning.

I think the cases have held that we should not allow a question like that to be given to a jury on speculation, surmise or guess, when the meaning is subject to two interpretations. When the Court itself had asked Mr. Cunningham as to what was the question before that, I think that is the essence of the problem which I am asking the Court to review, and that is that the question itself is subject to various interpretations.

"Did you ever order an airline ticket for yourself or anyone else?"

Clearly on the surface that question means to a lay person, whether that party ever went to an airline agency or that party ever went to the carrier itself.

THE COURT: It is in the context, "Have you ever heard anybody at the Crossroads speak about airline tickets?" It is very different from Brownstein.

MR. CUNNINGHAM: May I make one suggestion?

THE COURT: Let me suggest that you let one person speak.

Go ahead.

MR. KLEINBERG: Your Honor, I think that it does not fall very much afield from Brownstein. I think the question itself is subject to two interpretations. The Brownstein rule is very similar. I think Judge Burger indicated that it is incumbent upon a prosecutor asking questions in a grand jury to be as precise and as specific as possible when you have the problem of a perjury indictment before a defendant. Here it was an easy task, your Honor, for that prosecutor in that grand jury to direct a very specific and precise question to the witness.

Mr. Cunningham is thinking that the events that took place ten or eleven months prior to her appearance in the grand jury, which is recorded on the tape, was in the mind of the witness at the time he asked the question.

THE COURT: That is up to the jury.

MR. KLEINBERG: The point is, that the prosecutor in the grand jury had that affirmative obligation to ask a specific and precise question, and if that question which we have before the Court is subject to various and plausible interpretations, why should we allow a jury to guess?

THE COURT: I do not allow a jury to guess. The ruling there is if an answer is literally true, it is not perjurious. This answer was not literally true. The motion is denied.

MR. KLEINBERG: In United States v. Wall, the party was asked a question if she went on a trip. The Court ruled that it was subject to two plausible interpretations.

The same thing in United States v. Latimore, the definition of the Communist Party. In those cases, your Honor, it is quite clear that the Court said that there must be a mutual meeting of the minds, between the questioner and the party answering the question, as to what the question meant.

THE COURT: That was Sixth Circuit.

MR. KLEINBERG: I would indicate that in the Brownstein case they spoke to the Wall case, and they spoke to the cases which I cited to the Court, and all those cases state the same proposition:

"If a question on the surface can be subject to a different interpretation, the witness should not be subject to a perjury indictment."

THE COURT: Your second point is that the answer was not material?

MR. KLEINBERG: We are moving on, I see.

THE COURT: I have decided this.

MR. KLEINBERG: All right, yes.

THE COURT: Certainly if they're investigating stolen airline tickets, it was material.

MR. CUNNINGHAM: If we could get back -- I am running out of handles on this case. I think the first argument of defense counsel was not brought out in his brief, but only mentioned originally in his affidavit which accompanied it.

THE COURT: Are you asking me to reconsider?

MR. CUNNINGHAM: No, your Honor.

MR. KLEINBERG: I am going to argue that.

MR. CUNNINGHAM: Mr. Kleinberg has argued three points of his brief and I am not sure --

THE COURT: I have denied the motion to dismiss, because the question was too vague. I am coming to the question whether it was material.

MR. KLEINBERG: I indicated that the material that they had before the grand jury -- I believe Mr. Cunningham has indicated before that they had a tape recording and that conversation was played to the grand jury. They had that information. They had the information pertaining to the tickets. I do not think the answers which were given by the witness at any time frustrated or impeded the grand jury's investigation. Certainly, they had the evidence of Philip Albergo before Mrs. Zenkewrich testified. If they had all that evidence before, your Honor, I cannot see how -- let's say her answer is truthful, let's say that they did -- let's say she did commit perjury and her answers were untruthful --

THE COURT: You mean they had enough witnesses without her?

MR. KLEINBERG: Her answers in no way affected the outcome of that grand jury's investigation.

In what way did her answers impede the grand jury's investigation?

THE COURT: It probably made it a little harder for them to get up an indictment for stolen airline tickets against Albergo.

MR. MEISSNER: Albergo is not charged with any stolen airline tickets. He is also strictly a perjury case, your Honor.

THE COURT: He is arguing your point, is he not?

MR. MEISSNER: I understood your Honor to say an indictment --

THE COURT: He was not indicted because of

Mrs. Zenkewrich's perjury --

MR. MEISSNER: He wasn't indicted because they didn't have anything. That is the only reason he wasn't indicted.

THE COURT: I do not think you know why. The question is material. That motion is denied.

MR. KLEINBERG: I think the argument just made by Mr. Meissner -- if you would bear with me for a second -- it may have merit inasmuch as the witness was not given immunity in this grand jury and if they had any substantive evidence, they would have been indicted.

THE COURT: The question was material.

Your third point was that they were entitled to be told that they were lying?

That was decided in February by Judge Gurfein.

MR. KLEINBERG: I think that case can be distinguished.

THE COURT: It is United States v. DiSalvatore (phonetic).

MR. KLEINBERG: Let me indicate, as a former prosecutor, I think that what took place in that particular grand jury in respect to the questioning -- let me put it this way:

It was incumbent upon the prosecutor at that time, who had possession of these tape recordings, to refresh the recollection of the witness in respect to asking her questions about the conversation that purportedly was had with Philip. I indicated to your Honor in point 1 that there was a problem with the interpretation of the question itself. Obviously, one more question posed by the prosecutor to the witness, making a small reference either to the transcript itself or in fact playing the conversation, would only do one thing -- help the grand jury. As your Honor indicated before, they wanted to find out about stolen airline tickets. Why didn't the prosecutor attempt to find out about stolen airline tickets? All he had to do was ask her a question pertaining to the transcript or the tape recording. It is ten months before she is before the grand jury. Let her refresh her recollection and it's a very simple thing --

THE COURT: You can argue that to the jury.

MR. KLEINBERG: All the cases that I have read up to this point, and the case that you are going to cite -- I believe I have it here myself -- cites the Weinfield decision.

THE COURT: Yes.

MR. KLEINBERG: I read the Weinfield case and that's the case where they dealt with certain allegations of bribery and the prosecutor in the grand jury asked the witness questions relating to that bribe -- I am refreshing my recollection -- in order for him to refresh the witness' recollection in that case he specifically went down a list of names of people that he had taken bribes from. On that basis, your Honor, Judge Weinfield said that there was no duty to advise him that he was committing perjury, but the question before the Court was not whether there was an obligation to play the tapes or refresh the witness' recollection --

THE COURT: Whenever you get one decision, it leads to another a little bit beyond, and the DiSalvatore case says that there is no duty on the prosecution to tell the grand jury witness what evidence they have against him or give him the duty to tell him to tell the truth when he has sworn to tell the truth.

There might be more indictments if the prosecutor acted differently. He is entitled to truthful answers.

MR. KLEINBERG: I would like to cite the Fairly case, as long as we are talking about fairness, 214 F. Supp. 929, where the question is whether the methods employed in obtaining the testimony -- well, first, in that case an indictment was thrown out because the prosecutor did not refresh the recollection of the witness.

THE COURT: You can submit instructions to the jury on that point.

MR. CUNNINGHAM: Your Honor --

THE COURT: Let me hear from Mr. Kleinberg.

MR. KLEINBERG: I think the other cases that I submitted cite the proposition that when you have a witness before a grand jury, I think, rudimentary fairness dictates when a prosecutor is asking questions of a witness concerning events that took place ten months prior to her appearance, to at least attempt to try and refresh her recollection so she can answer the questions.

THE COURT: You can argue that to the jury. That part of the motion is denied.

MR. KLEINBERG: As to point 4, I would argue that is a sequel to point 3, in this regard:

Section 2518 of the United States Code indicates that after a wiretap ends -- after the life of a wiretap ends, that there is an affirmative obligation to give notice to a party on the order --

to the people whose conversations were intercepted. There is an obligation upon the prosecutor to bring it to the attention of the issuing justice for him in his discretion as to whether such notice should be given --

THE COURT: I would not welcome to have to read the entire log of an order that I had signed to see if there were other people that had to be notified.

MR. KLEINBERG: Let me explain the prejudice that took place here.

I cited the Eastman case in my brief, but I did not cite United States v. Chung 53 F. 2d 533. In that case, your Honor, the specific issue which I am bringing before the Court was before that Court, and the Court decided in that case that inasmuch as the prosecutor did not bring that information before the Court, the issuing Justice to decide in his discretion whether or not such notice should be given to the parties whose conversations were intercepted, was violative of the Fourth Amendment of the Constitution.

I say the prejudice in this situation is overwhelming, because such notice was not given -- such information was not given to the issuing Justice.

Your Honor, this witness was brought before a grand jury without counsel. Section 2505 -- 3504 indicates that a witness -- puts the obligation before the prosecutor to determine whether there are any wiretaps in the case and questions asked pertaining to those wiretaps. If she was given proper notice, your Honor, or at least have a Judge decide whether or not before she goes before any grand jury, she should be entitled to make a decision as to what her rights were--

THE COURT: I do not know what the difference would be -- what the effect would be if she asked to go before the grand jury now and tell the truth.

MR. KLEINBERG: I am sure she wouldn't be here today if she had counsel. I think it was an obligation by the prosecutor to take some affirmative steps to ensure Lorraine Zenkevrich's rights were protected. By violating this statute, I am putting this under prosecutorial misconduct, which I raised in point 3. I think they have an affirmative obligation to do so.

THE COURT: I am going to follow the Curry case. I think you are imposing a severe burden onthe prosecutor. You are saying that the United States Attorney should have notifed the State Court Judge to serve notice on people whose names later became material.

MR. KLEINBERG: I am saying that the United States Attorney should have taken every road possible--

THE COURT: You are taking every step possible to avoid Mrs. Zenkewrich standing trial.

MR. KLEINBERG: I hope I do that. That is my position as defense counsel.

Your Honor, with respect to the last point --

THE COURT: Yes.

MR. KLEINBERG: -- I have indicated in that point that there is no evidence before the grand jury to indicate at the time Miss Zenkewrich testified with respect to the obtainment of airline tickets. She was asked whether she ever received any airline tickets, did she order any airline tickets, and she answered in the negative. There was no evidence before the grand jury to indicate that she did, and that evidence I am speaking about is the question of the defendant's state of mind at the time she answered the questions in the grand jury.

The second part of the point is that the evidence which deals with -- rather the admission of the wiretapes into evidence in the grand jury was not properly authenticated.

THE COURT: Mr. Cunningham says it was.

A 72 MR. CUNNINGHAM: Your Honor, I think this is the problem where defense hasneglected to ask in its Bill of Particulars whether there was any authentication of thetestimony in the Grand Jury. He now brings the thing up in a pretrial motion. There was a patrolman that testified in the Grand Jury and the minutes are here in this courtroom.

MR. KLEINBERG: In a discussion with Mr. Cunningham the other day he indicated in his Bill of Particulars that a police officer testified in the Grand Jury about the voice identification of Mrs. Zenkerwrich. When I spoke to him the other day he indicated that police officer was a party that subpoenaed -- that gave her a subpoena --

MR. CUNNINGHAM: I said I was not sure. Let us stick to the record.

MR. KLEINBERG: Then I would like to know who was the party who testified in the Grand Jury about her voice identification?

MR. CUNNINGHAM: Come on, Monday morning, we will find out.

MR. KLEINBERG: Maybe we could stipulate?

MR CUNNINGHAM: I will be happy to.

THE COURT: The Government does not have to produce its Grand Jury witnesses.

2 MR. KLEINBERG: I am not saying that. I am saying that there was no evidence before the Grand Jury sufficient to indict this defendant.

THE COURT: Youare saying that the Government has an obligation to produce its Grand Jury evidence before hand.

MR. MEISSNER: I think Mr. Kleinberg wants your Honor to look --

THE COURT: I am not going to bother doing that.

MR. CUNNINGHAM: Since we are talking about conversations had, Mr. Kleinberg mentioned to me yesterday the reason he made half of the motions for he knew of no other reason for your Honor to read the Grand Jury minutes.

THE COURT: This is the extensive lawpractice. It is what doctors do avoid bringing malpractice suits.

MR. KLEINBERG: This is my first case in the Federal Court.

THE COURT: I am not saying that it is improper. I think you brought every possible motion, but they do not have any merit and you will have to go to trial.

MR. KLEINBERG: So you are denying the last point?

I would now like to address myself to the motions

3 which Mr. Cunningham indicated that I did not mention originally and that is the question of the witness testifying in a State Grand Jury before she testified in a Federal Grand Jury.

MR. CUNNINGHAM: Exc could I just interrupt? We have argued this on three separate occasions. Each time your Honor has said, "Mr. Kleinberg if you want to have the Grand Jury minutes, bring me an order and I will sign it, and you can have it post haste."

To date we have yet to have an order.

THE COURT: How are you going to prove the Grand Jury testimony on Monday -- that is the Federal Grand Jury testimony?

MR. CUNNINGHAM: Yes, I was going to ask counsel to stipulate. If not, I will have the foreman present in Court.

MR. KLEINBERG: Before we get to that, may I interrupt and go back to the point that I was raising? Counsel was quite correct in respect to what he said. I took it upon myself, your Honor, to get in touch with the Assistant D.A. in Kings County handling the case and I indicated the Court's representation with respect to the minutes and I was provided a copyof the State Grand Jury minutes of Mrs. Zenkerwich and low and behold upon reading the Grand Jury minutes, there are questions, which relates specifically to what is before the Court now and I indicate to your Honor that the law is very clear that the obligation is now upon the Government to demonstrate that the questions that were posed in the Federal Grand Jury were not in any way furnished by the State authorities.

THE COURT: Let me see what there was.

MR. KLEINBERG: I would like to read it into the record:

"Did you ever discuss with Philip Albergo the fact that the F.B.I. had interviewed one of his neighbors and she was going to spill everything on him --"

Excuse me: "Did you discuss the fact that the F.B.I. wanted to see him and that he couldn't talk to you over the phone and that he would speak to you in person later that day?

"Answer: Possible.

"Question: Did he speak to you about what it was about?

"Answer: If I saw him, yes.

"Question: What did he tell you it was about?

"Answer: Something about tickets or something or other.

5 "Question: Would that be airline tickets?

"Answer: I believe that is what it was about.

"Question: What did he tell you about?

"Answer: That he doesn't understand why they called him.

"Question: Did you receive any airline tickets?

"Answer: Did I ever receive any airline tickets?

"Question: Correct.

"Answer: No, sir.

"Question: Did you ever discuss with Philip Albergo the fact that the F.B.I. had interviewed one of his neighbors and that she was going to pile everything on him?

"Answer: No.

"Not that I recall.

"Question: Did you have a conversation --that conversation over the telephone?

"Answer: Not that I remember, sir.

"Question: Well, did you ever have a conversation with him?

"Answer: No, the only conversation that I had that he doesn't understand why they were calling him down for some airline tickets."

THE COURT: What is the point?

MR. KLEINBERG: The point is, your Honor, number

6 one:

There is definitely conversation pertaining to airline tickets in the State Grand Jury. The law, I think, is very clear. Inasmuch as a witness that appears before a State Grand Jury is compelled to give up her rights under the Fifth Amendment, that is the right not to speak, the right to remain silent -- if she is compelled to give up that right, the New York State Court says, "We will give her transactional immunity."

THE COURT: Thisis only perjury.

MR. KLEINBERG: What I am saying is that they are not allowed to do that.

The law is clear that they cannot furnish any information pertaining to any questions relating to anything that was testified to in a State Grand Jury and if that is done the cases have held that it should be dismissed.

THE COURT: What do you say, Mr. Cunningham?

MR. CUNNINGHAM: I wouldlike to make a couple of points to build a record perhaps.

This Grand Jury investigation went on for approximately two years, your Honor.

THE COURT: Which Grand Jury?

MR. CUNNINGHAM: The Grand Jury that was

7 investigating the stolen airline tickets.

THE COURT: State or Federal?

MR. CUNNINGHAM: Federal.

During that time several hundred witnesses appeared before it. In a normal investigation, it is customary for the F.B.I. agents to go out and interview people and possible subjects and possible defendants. This case was so large, they just went in and called people whose name came to their attention. Her name came up because it came up in a wire tap. She was not even spoken to by Federal authorities, to the best of my knowledge, prior to her entry into the Grand Jury. That is the reason that when she was put before the Grand Jury, Mr. Sherin, who was the Assistant that questioned her, advised her of her rights from the beginning, that this was a Federal Grand Jury investigating stolen airline tickets. Although the cases say he did not have to give her her Miranda Warnings, they were given.

Assuming arguendo then Mr. Sherin did have knowledge of this -- to the best of my knowledge he did not. Assuming that he did, there is still no violation because all the cases -- as cited in my brief -- say that while we may not base an indictment for a subsequent crime on testimony given under an umbrella of immunity, that is certainly no protection to allow a party to go ahead and commit perjury.

THE COURT: I think that is clear. She is not being prosecuted for anything she was granted immunity for.

MR. KLEINBERG: If the Hockberry (Phonetic) is read, it stands for the point that I am advancing, that is, a case wherein a party is compelled to testify and is given immunity and then did testify, and where portions of those questions were asked at a subsequent trial -- just for cross-examination -- the Court threw out the indictment.

THE COURT: Was that a perjury indictment?

MR. KLEINBERG: I do not know if it was --

MR. CUNNINGHAM: It was a substantative violation and as I recall it the Federal prosecutor attempted to use testimonybefore a Grand Jury that had been immunized --

THE COURT: Yes, I read that case.

MR. CUNNINGHAM: It has nothing to do with the case point.

MR. KLEINBERG: What the case speaks about is what immunity is all about and what can be done and what cannot be done.

THE COURT: If I grant immunity to a witness, 9 I will tell him he may still go to jail if he lies -- he is subject to perjury.

MR. KLEINBERG: And also he is subject to contempt, if he does not answer questions.

The point being is that the predicate questions, if furnished to the prosecutor after a party was obliged and forced and compelled to give up her rights --

THE COURT: There is no duty not to testify. The only privilege is not to self incriminate. The only incrimination is that false testimony. Anything more?

MR. KLEINBERG: Just a couple of more words on this. I think it is an obligation upon the prosecutor to bring to the Court Mr. Sherin or the Assistant D.A. who indicated that the information furnished to the Federal Prosecutor who asked the questions in the Grand Jury did not relate to anything that took place in the State Grand Jury.

THE COURT: It would not justify falsehoods. I adhear to my ruling.

MR. KLEINBERG: Thank you. I think I have run out of argument.

THE COURT: Mr.Meissner, do you have anything else?

MR. MEISSNER: Well, your Honor, in view of your Honor's rulings, I think to save time, if I could just repeat the same motions and have the same rulings, there is no use of my rearguing.

THE COURT: You can treat it asbeing in the Albergo record.

MR. MEISSNER: Yes, sir.

May I just point this out:

As far as the last point is concerned, I of course acting upon the representations of Mr. Cunningham, who received the representations of Mr. Hamerman -- the same ones told to me -- that there were no questions asked a bout airline tickets in the Grand Jury, I do not to this day have a copy of my client's State Grand Jury minutes.

I do know that he was given immunity also. I do not know what the questions were. He was represented by another attorney in the State case. I assume if the Grand Jury minutes that the State Grand Jury minutes of Mr. Albergo were to indicate that he also had been questioned as to airline tickets, your Honor's ruling would still remain the same as far as this case is concerned?

THE COURT: Yes.

I am keeping the issue here narrowed.

Were the statements made to the Grand Jury knowingly false? The jury may decide that they were not made knowingly false.

Do you have the tapes?

MR. CUNNINGHAM: Yes, your Honor.

MR. KLEINBERG: Your Honor, in respect to the first point, it appears that on Monday the 19th we are going to start trial --

THE COURT: Yes.

MR. KLEINBERG: Again let me indicate to the Court, this is my first Federal trial. I think the rules indicate that the prosecutor has the obligation to furnish a list of witnesses that they are going to call --

MR. CUNNINGHAM: I went ahead yesterday and I told Mr. Kleinberg all the witnesses we are going to have with one exception. I said there is one witness that I refused to divulge, because I fear for his life.

THE COURT: All right, you do not have to do it. I would like you to make the 3500 material available at the beginning of the trial.

MR. CUNNINGHAM: Fine, your Honor.

THE COURT: You said this would be a one day trial?

MR. CUNNINGHAM: I would hope so, your Honor.

12 THE COURT: I may pick two juries on Monday and start the second one after this one.

MR. KLEINBERG: May we have a list of the witnesses?

THE COURT: Mr. Cunningham has said that he has given you all names but one. That is all you are entitled to.

As to the jury selection, the Court conducts the voir-dire. It generally takes forty minutes to pick a jury. I will listen to questions that counsel may want to put.

Normally, I ask them about their employment by lawyers, law enforcement agencies, whether they have been witnesses themselves at any time --

MR. KLEINBERG: Whether they served in the Grand Jury?

THE COURT: Yes.

The Government gets six preemptory challenges, and you get ten and we run them in six rounds, the Government having one each time and you having two on the first four and one on the last two.

MR. KLEINBERG: The clerk was instructing me on the jury selection before.

THE COURT: All right, let us hear what is on the case.

MR. CUNNINGHAM: Your Honor, this purports to be a tape of 6/15/73, plant #3, reel number one.

If your Honor does not have a copy, I would hand it up to you.

MR. KLEINBERG: Your Honor, I think to save time, if we go through the transcript now and indicate what portions we want to delete --

THE COURT: One of them was mentioned already.

MR. KLEINBERG: Right.

(Tape played.)

THE COURT: Is that the same part that you have with the June 13th date on it?

MR. MEISSNER: The second part.

I can't make out my copy. I am basing it on Mr. Cunningham's copy.

THE COURT: That one that I have says "P" and "E" and shows 13 changed to 15 on thefirst page and June 15 on the second page.

MR. CUNNINGHAM: What you just heard is the tape of June 15 and that is this one here (Indicating).

MR. MEISSNER: This is the first page -- the first page which changed. The second page is the one that says June 13th.

THE COURT: Take a look at this one (Indicating). Maybe that 25 is 15. It appears to be the same

14 conversation. You can study the time and do anything else you want to do with respect to it.

MR. KLEINBERG: The argument Mr. Meissner is making is that the date June 13th, as opposed to June 15th --

THE COURT: I presume some officer will identify the tape? If this is reel one, it will show whether there was anything before June 14th.

MR. CUNNINGHAM: I think you ought to have somebody available Monday morning who wasmonitoring whatever tape there was on June 13th, or who was entering the log of June 13th to show whether there was any such conversation.

MR. CUNNINGHAM: If you would bear with me for a second-- we will have the party here, your Honor.

THE COURT: There was something mentioned about whether you wanted the foreman or you would stipulate to it? It would not take more than five minutesfor the foreman to testify.

MR. CUNNINGHAM: He would just have to leave his employment. All he would testify to is that he administered an oath to her on that date and she did so testify.

THE COURT: That is an essential part of the proof. Have him here.

15 MR. CUNNINGHAM: Very well, your Honor.

THE COURT: All right, I will expect that I will go ahead on Monday in this case. If there is another case following, I will pick a jury for that too and go into the Albergo case right after.

MR. MEISSNER: I have two problems. My client informed me today that he wants to substitute legal aid.

THE COURT: I will not do that at the end of the day when the case is scheduled for trial on Monday.

MR. MEISSNER: I am just relating what my client has informed me. I came here anyway, because I felt that I should be here.

THE COURT: He will have to come and make that application. He is likely not to have it granted. I am sorry, if it is a hardship on you. That is what happens.

MR. MEISSNER: I know.

MR. CUNNINGHAM: Is Mr. Kleinberg willing to stipulate that the Grand Jury stenographer, one Marlene Kramer, took the Grand Jury minutes?

MR. KLEINBERG: No.

MR. MEISSNER: Did we get a ruling on suppressing the wire tap? I do not know if your Honor started to.

THE COURT: I held it until I discovered about this

16 June 13th. If it has not been denied, I'll deny it now.

MR. MEISSNER: And a hearing also?

THE COURT: I have not heard anything that shows cause for a hearing.

MR. MEISSNER: All right.

MR. KLEINBERG: Have a nice weekend.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------x

UNITED STATES OF AMERICA

: 74-CR-818

- against -

:

LAWRENCE ALFANO, July 25, 1975

:

Defendant.

-----------------------------------x

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for United States of America

By: MYLES C. CUNNINGHAM, ESQ.
Assistant U.S. Attorney
of Counsel

ROSNER, ROSNER & McEVOY, ESQS.
Attorneys for Defendant

By: JONATHAN L. ROSNER, ESQ.
of Counsel

JUDD. J.

MEMORANDUM AND ORDER

Defendant's various motions in this case were disposed of at a hearing on May 9, 1975, except for a motion to suppress evidence concerning telephone conversations of the defendant overheard pursuant to a wire-tap ordered by the state courts.

A series of thirteen orders were submitted to the court, beginning with one signed September 22, 1972 by Mr. Justice Cohalan of the Supreme Court, Suffolk County. Intercepted conversations pursuant to that order led to seven successive orders on five different telephones. No conversations involving Mr. Alfano were intercepted over these taps. Mr. Alfano's conversation was intercepted for the first time on a tap authorized on May 22, 1973 by Mr. Justice Barshay of the Supreme Court, Kings County. This was followed by an order of Mr. Justice Martuscello dated June 14, 1973 directed to telephone numbers 212-382-9888/9, which was extended by order of Mr. Justice Munder dated July 9, 1973. Mr. Alfano was named in the extension order and referred to as "Larry" in the Barshay order. None of the earlier conversations intercepted were transmitted over Mr. Alfano's telephone.

The court reviewed the applications and affidavits and orders and found that the orders from and including that one before Justice Barshay's order of May 22, 1973 comply with the requirements of state law and of the federal statutes. 18 U.S.C. § 2515-20. Counsel for defendant asserted, however, that the court must review all the prior orders and perhaps hear testimony of Suffolk County police officers who had already testified in other proceedings in the Supreme Court, Kings County concerning state indictments against other defendants.

The general rule is that only persons whose telephones have been tapped or whose conversations have been overheard have a grievance which justifies attacking telephone interceptions under the ourth Amendment. Alderman v. United States, 394 U.S. 165, 174-176, 89 S.Ct. 961, 966-68 (1969). There is no automatic right to a hearing to test the credibility of affidavits submitted in support of a search warrant or a wire tap application. A hearing may be required only if there is independent evidence of falsity. United States v. Averell, 296 F. Supp. 1004, 1016 (E.D.N.Y. 1969).

The only cases cited by defendant for his position relate to the legality of the interception of conversations of the aggrieved person, and the use against him of information derived from such interception. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939); Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679 (1961); United States v.

Giordano, 416 U.S. 505, 94 S.Ct. 1820 (1974). There is nothing inconsistent with the Alderman case in the ABA's Standards on Electronic Surveillance, cited by defendant. See Approved Draft, § 2.3.

The government filed its notice of readiness for trial on April 21, 1975, but the court has been continuously engaged in trials and the disposition of submitted matters, which have prevented writing earlier on this subject.

It is therefore ORDERED that defendant's motion to suppress evidence received from electronic interception of telephone conversations be denied.

Counsel are requested to appear in court at 2:00 P.M. on Thursday, July 31, 1975, to set a date for trial.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

against :

LAWRENCE ALFANO, : 75 CR 298
74 CR 818

Defendant:

-------------------------------x

United States Courthouse
Brooklyn, New York

October 15, 1975
12:00 m.

Before:

HONORABLE ORRIN G. JUDD,

U. S D. J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MYLES CUNNINGHAM, Esq.
Assistant U.S. Attorney

ROSNER, ROSNER & McEVOY, Esqs.
Attorneys for Defendant

By: JONATHAN ROSNER, Esq.
of counsel

THE COURT: I have a letter from Mr. Rosner saying that he's going to be most of the day in the Appellate Division. What does that mean? Do they start in the morning? I thought they start at two.

MR. ROSNER: The calendar call is at ten o'clock. I don't know either the timetable or order for argument. The calendar call is at ten o'clock. I believe, my recollection serves me correctly, that I have two appeals on.

THE COURT: You say one is at the beginning and one is at the end?

MR. ROSNER: One is No. 1, and one is No. 23, your Honor.

THE COURT: Maybe I should have worked on this before. Sometimes in the U.S. Court of Appeals you can get them to rearrange calendars.

MR. ROSNER: I have tried that in the Appellate Divisions, your Honor. I find it impossible, perhaps because of the number they have in the Second Circuit on a daily basis is infinitely smaller.

THE COURT: We may just have to go over to Monday. I'll make an inquiry to see what we can do.

MR. CUNNINGHAM: With respect to that letter, I would like to state for the record I have looked over with regard to Brady material, I have looked over the files in this case to the best of my ability, as I'm sure your Honor was aware, this investigation was originally conducted by Francis Sheerin. He called several hundred people before the grand jury and some of them testified before it, with and without immunity.

I have not personally had the time or ability to be able to go through each and every one of those grand jury transcripts. I have gone over some, which I thought might be relevant to this case. I was not able to find any Brady material. I do not know of any Brady material that exists.

I have made a representation to Mr. Rosner that if he wished, I'd be willing to show him, with the Court's approval, the entire grand jury minutes there if he thought there might be any specific Brady material to be found in there, and from the way that he was chatting on the phone I thought he might have the name of a specific witness that might have given specific testimony. However, he was unable to come up with specific names.

I am not aware, I can candidly say I'm not aware of any Brady material.

MR. ROSNER: If I might respond, your Honor, surely if Mr. Cunningham has not had the time to go through the hundreds of witnesses, the offer extended to me according to Mr. Cunningham's recollection on or about September 30th, would not leave me the time. No. 1.

No. 2, I did never understand that it was my obligation under Brady progeny to specify Brady material that may be in possession of the Government, indeed, were I aware of it, it would be superfluous for the Government to reveal it to me.

THE COURT: I suppose if Mr. Cunningham doesn't know of any, that satisfies his obligation.

MR. CUNNINGHAM: I might say each one of the witnesses that appeared before the grand jury appeared under the caption of United States of America against John Doe. There was no person appearing within the grand jury as United States against the defendant here, Lawrence Alfano.

At this time, however, I would be turning over certain 3500 material to defense counsel: the testimony of Daniel Kilgallon, of April 11, 1974; the grand jury testimony of Robert Sampogne, of April 11, 1974, and also of December 26th, 1974;

and the grand jury testimony of Stephen Maltese, of February 14th, 1974.

MR. ROSNER: Might I suggest that be marked as a Court exhibit for the record.

THE COURT: I suppose it's 3500 material. Mark it as regular 3500 material.

THE CLERK: 3500-1 through 4. So marked.

(So marked)

MR. ROSNER: In that regard, I would like to call to the Court's attention as well as Mr. Cunningham's attention, information that I have obtained during the course of my preparation in respect of at least one of the witnesses that I understand the Government intends to call.

It is my understanding -- when I say my understanding, I have gotten some information that at least one, perhaps more than one of the witnesses the Government intends to call may invoke his or her privilege, and I would specifically suggest to Mr. Cunningham that he ascertain that fact before the witness goes on the stand, because if that does happen, I would obviously be in a position to move for mistrial.

THE COURT: Yes.

MR. CUNNINGHAM: Each one of the witnesses there, I would only be questioning them as to their testimony primarily before the grand jury. They've already testified. They waived any right to a Fifth Amendment.

MR. ROSNER: I obviously don't represent any of the witnesses. Indeed, I don't think I have spoken to any of them, to my knowledge. As an academic matter, testimony before a grand jury, as I understand the law, is not a waiver of a privilege at a subsequent proceeding.

THE COURT: No, but if the witnesses are sworn and refuse to repeat the grand jury testimony, there are ways of getting it in.

MR. CUNNINGHAM: I can read it.

THE COURT: If there's anyone you know who is going to claim a privilege, let's take it up beforehand.

Are there specific questions on voir dire you want put in?

MR. ROSNER: Yes, I have some.

THE CLERK: We have twenty-three jurors downstairs.

THE COURT: We'll take what we have.

Judge [illegible]swell has excused his panel until two o'clock.

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These seem to me to be proper questions.

MR. ROSNER: Thank you, your Honor.

THE COURT: Please send for a panel of jurors.

MR. CUNNINGHAM: Can we instruct the jury not to pay any attention to the wires that are set up in the courtroom.

THE COURT: Yes.

We'll have a small panel of jurors until some other judges finish their selections.

MR. CUNNINGHAM: You'll provide us what the order of lunch breaks will be, we'll impanel, or opening statements before lunch.

THE COURT: Probably too late for opening statements when we get the jury impaneled.

(Twelve jurors and two alternates are sworn.)

THE COURT: Please go back to the jury room to acquaint yourselves with the surroundings. We'll take a recess.

(Recess)

THE COURT: Bring in the jury.

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, I'm just going to give you a few introductory remarks to supplement the jurors' handbook you looked at, general statements about how a trial is to proceed.

First stage of the criminal case is the opening by counsel. The Government attorney will tell you what he intends to prove. The defense attorney may make an opening or he may waive it, because the defendant never has to say anything in a criminal trial or produce any evidence.

Whatever counsel says is not the evidence. It's just to help you to understand the facts as they are established.

You decide the case only on the testimony that comes forth in court. You'll have the important and the difficult task of deciding the credibility of witnesses.

A defendant is presumed to be innocent unless and until he's proved guilty beyond a reasonable doubt. The defendant has no duty to testify and you can't draw any inference against him if he doesn't testify.

While the evidence is coming in, counsel on one side or the other may object to questions or exhibits. I'll rule on these objections on the basis of the law of evidence. If I exclude any evidence, you're not to draw any inference from that fact or try to guess what it would have been.

My rulings won't indicate any opinion on the merits of the case or reflect on the person who offered the evidence or who made the objection.

We normally sit from 10:00 to 1:00, and from 2:00 to 4:30, with a midmorning recess and a midafternoon recess. During the recesses and overnight you're supposed -- directed not to talk to anybody about the case, not even talk about it amongst yourselves, lest somebody put himself on the record with an opinion that may not be timely.

If you meet any of the attorneys or witnesses or parties as you're going about the corridors or the elevators, don't talk to them at all. It is more important to avoid any improper input than it is to be polite.

When the case is all over, then counsel sum up, the defense attorney first and then the Government's attorney, and then I'll instruct you on the law and send you out to reach your decision.

Meanwhile, keep your minds open, listen just as carefully as if it involved somebody close to you.

Our practice in the Federal Court is for

Juror No. 1 to be the foreman. That means Mr. Vilanella will present any problems the jury might have to the Court. He'll preside at the end. He has just one vote. He's one juror among twelve.

We're now ready, I think, to have Mr. Cunningham proceed.

MR. CUNNINGHAM: Judge Judd, Mr. Foreman, ladies and gentlemen of the jury:

As Judge Judd has told you, an indictment is merely an allegation of a crime. Let's look for a moment at the indictment. The Government has charged Mr. Alfano on two occasions with possession of airline tickets knowing them to have been stolen.

The Government is going to prove that in the spring of 1973 Mr. Alfano had two airline tickets. These airline tickets were stolen from a shipment. That shipment was going from Nashville, Tennessee,to New Jersey.

That on May 23, 1973, or -- excuse me -- between May 23, 1973, and July 23 of the same year, 1973, the Government also alleges at this time he had three airline tickets in his possession. These tickets similarly were stolen, and they were going from Nashville, Tennessee, to New Jersey.

The Government is going to prove several different factors. First of all, the purpose of this opening statement is trying to give you a little idea, a little opening into what the Government's whole case is going to be.

First of all, we're going to show these tickets actually were moving in interstate commerce, people will testify as to these tickets coming from Nashville, Tennessee, where they were printed. They were going to two different travel agencies in New Jersey.

The Government will also show these tickets never reached their destination, there were reports put out these tickets never arrived.

Further, we'll show these tickets are worth over a hundred dollars, in excess of one hundred dollars.

We're going to show the defendant actually possessed them, that he had these tickets in his possession. In fact, in Count One of the indictment, the first two tickets that were mentioned, he allowed his two children to utilize these tickets and fly to Florida, and the second count of the indictment where there were three tickets involved, he allowed one of his good friends to use the tickets. They flew on the tickets.

The important thing, before this man can be found guilty is that he had to know that these tickets were stolen.

I would ask you ladies and gentlemen when you're listening to the witnesses testifying, pay very close attention, because knowledge is a state of mind, which is very difficult to prove. We will ask you now to use your own intelligence as jurors when you're listening to the testimony of witnesses and to see whether or not a reasonable person would have known these tickets in fact were stolen, that in fact Mr. Alfano did know that these tickets were stolen and in fact he was in business of selling stolen airline tickets. Thank you

THE COURT: Mr. Rosner, do you want to say anything?

MR. ROSNER: Briefly, if I might, your Honor.

May it please the Court, Mr. Cunningham, ladies and gentlemen of the jury:

It was said by probably one of America's greatest trial lawyers, Clarence Darrow, that to the average man a lawsuit is a calamity. You can well imagine if that is so to the average man, a criminal litigation is a disaster.

Your duty as jurors in any case is one of the highest callings of a citizen. All the more so in this case, where a man is on trial for his liberty.

Mr. Cunningham has indicated, I think appropriately, that you should listen to the witnesses with great care and great caution. He's indicated that you must put yourself in the place of the witnesses, coming to a conclusion as to what a reasonable man would know.

We specifically ask you to listen, to listen to the instructions on the law as the Court will give them to you, particularly in the area of the required knowledge that the tickets that the defendant is alleged to have possessed were stolen from interstate commerce.

At the end of the case, you will have a burden that I would not want, to determine the guilt or innocence of another human being. I ask you to fulfill that obligation with a sense of justice. Thank you.

THE COURT: Mr. Cunningham, you may call your first witness.

MR. CUNNINGHAM: Thank you, your Honor.

SOCRATES GEORGEADES, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q By whom are you employed, sir?

A Rand McNally & Company.

Q Were you so employed by them in 1973?

A Yes, I was.

Q How long have you been employed by Rand McNally?

A Twenty-seven years.

Q What's your function?

A Assistant sales manager in the ticket sales division of Rand McNally.

Q When you say you're in the ticket sales division of Rand McNally, what actually does that division do?

A We print tickets for about eighty-five percent of the airlines, the railroads, the buses, credit coupon books for banks, et cetera.

Q Do you also print tickets for the Air Transport

Association?

A Yes, we do.

THE CLERK: Two documents marked Government's Exhibits 1 and 2 for identification.

(So marked)

Q I show you Government's Exhibits 1 and 2. Can you identify those tickets (handing to witness)?

A Yes, these are A.T.A. tickets, which we print for the Air Traffic Association.

Q Those are the tickets in the name of Mr. Alfano.

MR. ROSNER: Objection, your Honor.

THE COURT: They haven't been offered in evidence yet. I don't think he can read them.

Q Sir, can you tell where those tickets were manufactured?

A These tickets were manufactured in our Nashville, Tennessee plant.

MR. CUNNINGHAM: Could we have a side bar for a moment.

(Side bar)

MR. CUNNINGHAM: If your Honor will recall in the case of U.S. v. Gallo, we put through a series of documents which are the same documents which I purport to put into evidence here. These documents here have all been marked into evidence in the Gallo trial. The Gallo trial is still not finalized. It's on appeal right now. Maybe the Court would want to mark these.

THE COURT: Can we use the same numbers? Sometimes we premark.

MR. ROSNER: I have no objection to the same numbers. Obviously, the jury might get the impression that it was another proceeding.

THE COURT: I'll let it go out of order.

MR. CUNNINGHAM: The numbers--

THE COURT: As they are.

MR. CUNNINGHAM: They have different CR numbers on the labels.

THE COURT: The jury can see the number when they go downstairs on the calendar wall.

MR. ROSNER: We can make copies, put the scan over what that will be read as.

THE COURT: The colors won't show on the copies. I don't know whether the colors are significant.

MR. CUNNINGHAM: I don't think so.

MR. ROSNER: Does it make a difference if

Georgeades-direct

the colors show or not?

MR. CUNNINGHAM: It might save time right now if we can have an offer of proof. Maybe we can mark these things in advance not in the presence of the jury.

THE COURT: I thought we would like to get one witness on this afternoon.

MR. CUNNINGHAM: We might be able to do both, if we have a stipulation as to these documents.

THE COURT: Have you seen them before?

MR. ROSNER: I have copies, your Honor. I read them and quite candidly they make no sense to me. They're a jumble of numbers. I tried to cross-reference them. I couldn't do it.

MR. CUNNINGHAM: Can the jury be dismissed for five minutes. We'll have Mr. Georgeades go through it. If it satisfies Mr. Rosner.

THE COURT: All right.

MR. ROSNER: Might I make a suggestion: Let Mr. Cunningham have them identified by the previous numbers. If the jury wants to use them in their deliberations, that's the only time they'll see them, then we can use copies.

THE COURT: All right, suppose we do that.

(In open court)

THE COURT: I hope the jury won't be confused if we use exhibits that have numbers that won't come in order. We'll save time if we let Mr. Cunningham proceed with these as he presents them.

Q Sir, can you tell me what Government's Exhibit 11 is supposed to be.

A This is a call-out order by A.T.C. for tickets. This is what we call a release order. They send us this order telling us to ship a certain amount of tickets to this particular travel agent, which is Greenwald.

Q Once you get that exhibit there in front of you, what steps does the Rand McNally Company take?

A We print and store the A.T.C. tickets in our plant and hold them until we receive a release order, such as this. Upon receipt of this order, we immediately assign the numbers which are listed here and ship these tickets out directly to the travel agent.

Q Sir, from that document you have in front of you, can you tell whether or not the Government Exhibits 1 and 2 are two airline tickets which were part of that shipment to Greenwald Travel?

A Yes, both were in the shipment.

Q Can you tell us what the next document you have in front of you is, sir?

Please refer to it by the number that's on there.

A I believe this is Document 12, Exhibit 12.

Q Yes.

A Exhibit 12 is an airway bill or bill of lading issued to Wings & Wheels for this particular shipment.

Q Can you tell us in your own words what that means?

A Well, once we get the shipment ready, we call Wings & Wheels, who picks up this shipment from us. This particular shipment was one piece, weighed three pounds, and it was, I believe, date of pickup was 4/24.

Q That would be April 24th?

A Yes.

Q What year?

A '73.

Q Can you tell us what the next document is?

A The next exhibit is Exhibit 20. It's an Air Express International Corporation Wings & Wheels. This is an airway bill from Wings & Wheels to Air Express International Corporation. They are the carriers, I guess, of these tickets. This was four cartons, of which this particular carton was part of it, total weight was 85 pounds, for shipment to Wings & Wheels in Newark, New Jersey.

Q Can you tell us what Wings & Wheels is? You used that term.

A Wings & Wheels is a carrier, a shipper, which Rand McNally uses, which is -- let me phrase it this way, if I may: A.T.A.tells us how to ship this. They tell us who to use. In this case it happens to be Wings & Wheels. They are responsible for the shipment from the Rand McNally plant direct to the travel agent.

Q What is the next document in front of you, sir?

A This is Government Exhibit No. 21. This is, again, happens to be a uniform air bill, consignee is Wings & Wheels, Newark, New Jersey. I believe this is proof that the shipment was received by Wings & Wheels in Newark, New Jersey.

Q What is the next document?

A Exhibit 22 is a description, they call it an over short-damage report, which is made out by Wings & Wheels and it's a carton stolen from Wings & Wheels--

MR. ROSNER. Objection, your Honor, move to strike.

THE COURT: "Stolen" is a conclusion, I suppose.

THE WITNESS: Missing.

THE COURT: Carton missing. It says stolen. Carton missing.

A Carton missing from Wings & Wheels, Newark, document--

MR. ROSNER: This document is not in evidence.

THE COURT: This is a regular business report of yours, isn't it?

THE WITNESS: Yes.

THE COURT: I'm going to receive it.

MR. ROSNER: There's no foundation for it.

MR. CUNNINGHAM: Received subject to connection.

MR. ROSNER: I don't think there's a foundation, subject to connection or otherwise.

THE COURT: I'll receive it subject to connection.

Q You were saying about that document?

A It's a document made out by Wings & Wheels for a missing carton--

MR. ROSNER: Might I be heard?

THE COURT: Come over.

(Side bar.)

MR. ROSNER: According to his testimony the document is made out by Wings & Wheels. He works for Rand McNally. There couldn't be a foundation under the business records rule. He's not a custodian, has no knowledge of it.

THE COURT: I'm certain Wings & Wheels is available.

MR. CUNNINGHAM: In the courtroom.

THE COURT: Received subject to connection.

(In open court)

Q Could you please continue. Tell us what that document is in front of you.

A It's a document reporting a missing package from the Newark dock, morning of April 26, 1973. Action taken: Notified all the truckers -- I can't read this. Anyway, it's signed by a fellow named G. Sanoff.

THE COURT: Go on to the next one.

THE WITNESS: That's it.

Q Taking those documents in their entirety, can you explain to the jury what they represent in your own words.

MR. ROSNER: Objection.

MR. CUNNINGHAM: At this time I ask it be received subject to connection.

THE COURT: I'll receive it subject to connection.

MR. ROSNER: Will the Court note my objection.

THE COURT: Yes.

You can explain them.

THE WITNESS: This is documentary proof that the shipment left our plant at Nashville, Tennessee, was picked up by Wings & Wheels, shipped by Wings & Wheels to their Newark dock, received at the Newark dock and later-- but never arrived at the travel agent, apparently the tickets were missing, if I can use that word, after they were received in Newark by Wings & Wheels.

THE CLERK: Tickets marked Government's Exhibits 3, 4 and 5 for identification.

(So marked)

Q I'm going to show you Government Exhibits 3, 4, and 5 for identification and ask you if you can identify these tickets (handing to witness).

A They're coupons taken from a ticket from an A.T.A. ticket and these are actual parts taken out of a ticket. They're real.

THE COURT: Are they part of this shipment?

THE WITNESS: Not part of this shipment.

THE CLERK: Five documents marked Government Exhibits 6 through 10 for identification.

(So marked)

Q I show you Government's Exhibit 6, 7, 8, 9 and 10 for identification (handing). I ask you what you identify Government Exhibit 6 as.

A Again, Government Exhibit 6 is a release order or draw-out order from A.T.C. to Rand McNally telling us to ship various ticket forms to Bayonne, travel agent in Bayonne, New Jersey.

Q Sir, is that a different request than the past one?

A Yes.

Q Sir, if you look at Government's Exhibits 3, 4, and 5, can you tell us from the exhibit in front of you whether or not those exhibits were part of that shipment.

A These coupons, the numbers on these coupons correspond with the tickets that were shipped on this particular authorization to Bayonne Tragel Agency.

Q Sir, can you tell us what the next exhibit marked for identification is in front of you?

A Exhibit No. 7 is our order or freight billed to Wings & Wheels to ship this particular shipment to Bayonne Travel Agency.

Q What is the next document?

A Exhibit 8 is Wings & Wheels airway bill for shipment. In other words, Air Express International Corporation. It's the same shipment.

Exhibit No. 9 is the consignee uniform airway bill, Wings & Wheels, for shipment to Newark, New Jersey. Shipment was received in Newark, New Jersey by Wings & Wheels.

Finally, Exhibit No. 10 is a form made out by Wings & Wheels saying that this particular package was missing.

Q And you're looking at those five exhibits--

MR. CUNNINGHAM: Withdrawn.

At this time I ask Government Exhibits 5 through 10 be received.

THE COURT: Any objection?

MR. ROSNER: Yes.

MR. CUNNINGHAM: 6, 7, 8, 9 and 10 be received subject to connection.

MR. ROSNER: I don't think there's a proper foundation.

THE COURT: Some of them require further foundation, but I'll receive them with further connection.

Q Can you tell us what those five documents are?

A These five documents are documentation or authentication the shipment left our plant in Nashville, was picked up by Wings & Wheels. Wings & Wheels was responsible for shipping it to their dock as they call it, in Newark, New Jersey. Both shipments were received at their dock, but the shipments never arrived at the final destination, which was the travel agency.

Q The five airline tickets, Government's Exhibits 1 through 5, all those tickets were manufactured by Rand McNally?

A Yes

MR. CUNNINGHAM: No further questions.

THE COURT: You may cross examine, Mr. Rosner.

CROSS EXAMINATION

BY MR. ROSNER:

Q Sir, I ask you to look at Government Exhibits 1, 2, 3, 4, and 5. Can you tell the Court and jury what appeared on those documents when they left Rand McNally?

A Blank tickets. None of the handwriting appeared and/or the agency stamping or the airline name.

Q In other words, it was a blank form?

A Blank, numbered and printed only, but no filling in of the station names as it appears here.

Q So that, for example, on Exhibits 3, 4 and 5, the name Grimes Travel Agency, New York, New York, did not appear?

A Right.

Q Nor did National Airlines?

A No, sir.

Q On 1 and 2 the name Central Tours, Inc., and Eastern Airlines did not appear?

A No, sir.

Q You're familiar with the printing and issuance of airline tickets, I gather.

A Yes, sir.

Q Can you tell the Court and jury what printing National Airlines 010 3 means at the bottom of Exhibit 3 through 5?

A National Airlines is the carrier in this particular case. 010, their airline code. I can't really say what the "3" is.

Q When you say the airline code, what do you mean?

A Every airline has a three-digit code number. Eastern would be 007. National is 010.

Q Exhibits 1 and 2 appear to have two documents. Can you tell us what those two documents in each one indicate?

A [illegible] is the first ride coupon, which takes the person from New York to Fort Lauderdale. The second is the second ride coupon, which brings the person back from Fort Lauderdale to New York. Both out of the same ticket, same number.

Q The same thing is true of Exhibit 1?

A Yes, sir. New York to Fort Lauderdale, Fort Lauderdale back to New York, yes.

Q I assume in your occupation you have seen literally hundreds, perhaps thousands, of airline tickets.

A Yes.

Q Both in blank and as issued?

A Well, mostly in blank. I would say more blank than issued.

Q You've seen a great many issued?

A I have.

Q If somebody gave you any one of these, any one of these five exhibits, 1, 2, 3, 4, 5, is there any

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way with your background and experience that you could determine whether those tickets were stolen or not?

A Were stolen?

Q Yes.

A You mean-- Well, I couldn't say if they were stolen. I would say who did the imprinting up there did a fine job. It would be hard to detect.

Q What I'm asking you, assuming that Government Exhibit 5 with all of its counterparts -- I don't know if that's the technical name for it or not--

A That's right.

Q --in the folder that I assume they're printed in, with the handwriting and the stamping that appears on here, were sold to you, could you determine from looking at it that it was in fact stolen?

A Yes, there is one point that would make me suspicious.

Q How is that, sir?

A Usually when you buy an airline ticket they fill in the fare, the tax, and then total it up. This is shown as a lump sum, which is not the way it's done at the counters, but I happen to know that. I don't think an ordinary layman would know.

MR. ROSNER: No further questions.

THE COURT: Any redirect?

MR. CUNNINGHAM: No.

(Witness excused)

MR. CUNNINGHAM: The Government calls as its next witness Mr. Zackaroff.

GEORGE ZACKAROFF, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name.

THE WITNESS: George Zackaroff, Z-a-c-k-a-r-o-f-f.

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Zackaroff, by whom are you employed?

A Wings & Wheels Air Express International.

Q How long have you been so employed?

A Ten years, approximately.

Q Have you been so employed by Wings & Wheels in 1973?

A Excuse me?

Q Were you employed by Wings & Wheels in 1973?

A Yes.

Q What is your position with Wings & Wheels?

A At that time I was a day supervisor.

Q What is Wings & Wheels?

A We're an air freight forwarder, giving service to the public.

Q Sir, as an air freight forwarder, is one of your accounts the Rand McNally Corporation?

A That's correct.

Q What functions do you perform for Rand McNally?

A We move various shipments from them, from their office in Nashville to various points throughout the country.

Q I'm going to show you Government Exhibits 11, 12, 20, 21, 22, and ask you if you can identify those documents, sir.

A The first--

Q Take them as a group. Are you familiar with those documents?

A All except one.

Q Which is the one document you're not familiar with?

A The bill of lading from the Air Traffic Conference of America.

Q What exhibit number is that, sir?

A Government Exhibit 11.

Q If you'll put that off to the side for a moment.

A (Witness complies.)

Q Take a look at the other documents in front of you. In your own words, sir, can you tell us what those documents purport to be.

A They represent documented proof that we had picked up a piece of freight that weighed three pounds from Rand McNally and moved it through as being an air shipment.

Q You picked it up in Nashville?

A Yes.

Q Where were you to deliver it?

A By this document it would be in Greenwald Travel Service, Clifton, New Jersey.

Q Can you tell whether it ever got to Greenwald Travel?

A I have from my company an O.S & D. form.

Q What is it?

A This states that on June 5th it was reported to the Newark Police Department that one piece of three pounds that was going to the Greenwald Travel Service in Clifton was missing from the warehouse or from the dock at

Hopson
does
not
figure

Newark, New Jersey.

Q I'm now going to show you Government's Exhibits 6 through 10 (handing) and I ask you if you look at Document No. 6, that's the document from the Air Transport Association; is that correct?

A That's correct.

Q That's a document you're not familiar with?

A I'm not familiar with that one.

Q Looking at documents 7 through 10, sir, can you tell us in your own words what they purport to be.

A This, again, is with the shipment from Rand McNally going to Bayonne Travel, Bayonne, New Jersey, and is documented proof the shipment was actually shipped by Rand McNally, received in our possession, given to an airline and reached the destination at Newark.

Q Reached the destination in Newark? Can you tell in that documentation if it actually got to its final destination, Bayonne Travel Service?

A Again, there was an O.S.& D. filed on June 7th, pertaining to this shipment.

Q What is that document you're talking about?

A It states that-- This one states it was actually given to the trucker, but the trucker had called us by phone saying he could not find the piece to deliver it on his truck.

Q The shipment never arrived?

A Never arrived at this particular travel agency.

MR. CUNNINGHAM: No further questions.

THE COURT: You may cross-examine.

CROSS EXAMINATION

BY MR. ROSNER:

Q Mr. Zackaroff, can you tell by looking at Exhibits 22, 12, 20, 21 and 11 when the shipment containing Exhibits 1 and 2 left Nashville?

A No, I couldn't do that.

Q Can you tell when they arrived in New Jersey?

A No.

Q Can you tell when they were first reported missing?

A No.

Q Can you tell the value of the tickets that were reported missing?

A No.

Q Can you tell how many tickets were reported missing?

A No.

Q No way?

A No way. All I know--

Q Directing your attention to Government Exhibit 22 and to the handwriting that appears at the far right-hand of the fourth line, what does that say?

A It's a space marked "Declared Value," which is marked N.V.D., which means no value declared.

Q Does this indicate incidentally, also referring to Exhibit 22, something with respect to the hours of 8:30 and 1300 on April 26, 1973?

A Yes.

Q Would that indicate when it was missing or when it was first reported missing?

A That's when it was first known to be missing.

Q But you don't know when before that--

A Well, as stated, between 8:30 in the morning and 1:00 o'clock in the afternoon.

Q That's when it was first known to be missing, but you have no idea how long before that it actually was missing?

A It had to be at 8:30 in the morning, between those hours, because the freight was actually brought in at approximately 8:30 in the morning. It was there.

Q Didn't you just testify there was no way you could tell when the shipment left Nashville or when it arrived in New Jersey?

A As per particular ticket, as to this particular 32-pound piece, I can't. As it being one single ticket, I couldn't do that becasuse I'm not familiar with what Rand McNally puts into its cartons.

Q In other words, you can't say whether 1 and 2 were in this shipment that was reported missing between 6:30 in the morning and 1300 on April --

A No, that I couldn't do.

Q O.K. With respect to Government's Exhibits 10, 9, 8, 7, 6 -- seem to be going backwards -- can you tell when that shipment left Nashville?

A The one left on 5/23/73.

Q Can you tell when it arrived in New Jersey?

A By this document, no, I cannot.

Q Can you tell when the shipment was first reported missing?

A That was on June 7th.

Q Of 1973?

A 1973.

Q Was this shipped by air or land?

A By air.

Q You mean it left Nashville on May 23 and arrived in Newark on June 7th by air?

A No, I wouldn't say that. I say I cannot establish the exact date it was that it did arrive by the documentation that is here (indicating).

Q I assume you also can't testify as to what particular tickets were involved in this shipment?

A No, I cannot. All I can say, it was one carton, had so much weight. What it contained I don't know.

Q How about the value?

A Declared value, N.V.D., no value declared.

MR. ROSNER: I have no further questions of the witness.

THE COURT: Do you have redirect?

MR. CUNNINGHAM: No, your Honor, none.

THE COURT: Thank you, Mr. Zackaroff. You're excused.

(Witness excused)

THE COURT: Anything more this afternoon?

MR. CUNNINGHAM: I don't think so, your Honor.

THE COURT: It's just about 4:30. We'll adjourn until ten tomorrow morning.

Don't talk about the case in the meantime amongst yourselves or with anyone else, and don't talk at all to the people who are in the courtroom if you happen to see them. Thank you.

(The jury leaves the courtroom.)

THE COURT: Mr. Cunningham, will you make copies of Exhibits 11 and 12 and 20 through 22, so they can be available for the jury?

MR. CUNNINGHAM: Surely.

THE COURT: Have you any requests you're going to want other than what was in the Gallo charge?

MR. CUNNINGHAM: It will be fine.

THE COURT: Mr. Rosner, can you get me the requests by Friday afternoon?

MR. ROSNER: I will make every effort to, your Honor. In part, I'm sure the Court understands it's going to depend what I hear in court. I have some requests drafted and ready to submit to the Court, and it will depend on other testimony.

THE COURT: How many days is this really going to take on the Government's side now? You moved faster today than in Gallo.

MR. ROSNER: I would like to take some credit for that.

MR. CUNNINGHAM: Practice makes perfect. It's going to be hard for me to say. I don't think the Government will go to Monday, the latest.

THE COURT: Have you given Mr. Rosner the 3500 material for tomorrow's witnesses?

MR. ROSNER: Might I, before we adjourn for the evening, I didn't do it before, No. 1, because Mr. Cunningham indicated what these two witnesses would testify to. No. 2, I didn't want to do it in the presence of the jury, I would specifically request sequestration of any other witnesses.

THE COURT: You'll keep them in the jury room next door.

MR. CUNNINGHAM: Your Honor, the Government served five or six subpoenas. One subpoena was served on a gentleman by the name of Stephen Maltese, and on Wednesday I received a telephone call from his attorney, Mr. Jay Zerin, who purported to be Mr. Maltese's attorney and he intimated to me, Mr. Maltese was not happy with making an appearance.

I asked him to voluntarily come into my offices on Friday and he said he was not interested in coming in voluntarily.

I said, "I'm afraid we're going to have to get a subpoena." I believe he was served on the 11th day of this month, by Mr. Rigolizzo.

He has not been present in court today.

Similarly, a Mr. Daniel Kilgallon was

subpoenaed by the Government to appear today. I've had no contact with either him or his attorney, but I would like the record to note he's not present in the courtroom today.

I was wondering what the Court would have, suggestions, as to what action should be taken.

THE COURT: Call Mr. Zerin. Tell him his client is to be here or you'll have a marshal go get him.

Are they your first witnesses tomorrow?

MR. CUNNINGHAM: No, but I was intending to bring their testimony in tomorrow.

THE COURT: What do you think is the most effective way?

MR. CUNNINGHAM: Your Honor, there's going to be problems on this thing. Both Mr. Alfano, Mr. Maltese and Mr. Sampogne, who is present in the courtroom, were all targets of an investigation in the Brooklyn District Attorney's office, all of whom are under indictment over there, on numerous counts of perjury and loan sharking and gambling, I believe.

MR. ROSNER: If I might interrupt the Government, your Honor, I respectfully submit that any comments that Mr. Cunningham might have should not in any way include Mr. Alfano, who has been here every time he's had to be here.

THE COURT: I think he misspoke when he mentioned Alfano.

MR. CUNNINGHAM: I meant nothing of Mr. Alfano, your Honor. They also were co-defendants of Mr. Alfano, so all their testimony came out of the crossroads, all the indictments came out of the taps for perjury. I was wondering if it wouldn't be necessary to have the marshals try to go out to serve them with arrest warrants today to guarantee their presence here.

As I said, I did have a conversation with Mr. Zerin, who is the attorney for Mr. Maltese.

THE COURT: I won't be here after six. If you want to send out for them as material witnesses you can do that.

MR. CUNNINGHAM: Perhaps what we might do--

(Pause)

MR. CUNNINGHAM: Your Honor, perhaps I'll try to get in touch with Mr. Zerin this evening. If their defendants -- witnesses, are not present in the courtroom tomorrow morning we can have them arrested as material witnesses and brought in.

THE COURT: That's a little better, rather that have them overnight.

MR. ROSNER: If I might carry your Honor's query of Mr. Cunningham to the point where I can get a response, whether there's any other 3500 material with respect to witnesses whom the Government intends to call tomorrow which would facilitate the trial.

MR. CUNNINGHAM: Your Honor, I believe there's no 3500 material as to Mr. Scinta, who will be the Government's next witness. The grand jury minutes of Mr. Alfano have already been turned over to him. I will have some 3500 material for him of Mr. Morton Kohlberger, 3500 material of Mr. Stephen Maltese has been turned over to him. 3500 material of Mr. Kilgallon and Mr. Sampogne and Mr. Maltese have been turned over.

I think that will be it for tomorrow, your Honor.

THE COURT: Very well. We can't tell just how much time I'll have on Friday, but we should try to go ahead, say, from 11:15 on, in case I get through my motion calendar by then.

MR. CUNNINGHAM: I have some problems with my calendar on Friday. I don't know how late I'll be. I should be through by 11:00 o'clock.

MR. ROSNER: I have no problems on Friday.

THE COURT: Good evening.

(Time noted: 4:40 p.m.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------x

UNITED STATES OF AMERICA :

against :

LAWRENCE ALFANO, :

Defendant :

-------------------------------x

75 CR 298
74 CR 818

United States Courthouse
Brooklyn, New York

October 16, 1975
10:00 a.m.

Before:

HONORABLE ORRIN G. JUDD,

U. S. D. J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MYLES CUNNINGHAM, Esq.
Assistant U.S. Attorney

ROSNER, ROSNER & McEVOY, Esqs.
Attorneys for Defendant

By: JONATHAN ROSNER, Esq.
of counsel

THE CLERK: Criminal cause on trial, United States of America versus Lawrence Alfano.

THE COURT: Is your witness ready, Mr. Cunningham?

MR. CUNNINGHAM: Yes. I think we ought to take a couple of matters up first. I received-- Neither Mr. Maltese nor Mr. Kilgallon were present. Apparently Mr. Kilgallon came an hour and a half late. Mr. Maltese's wife gave me a telephone call last evening around five o'clock saying that he had very suddenly been stricken with head and chest pains and was admitted to Long Island Hospital.

I checked with Long Island Hospital last night and I was speaking to the administrator over there. Mr. Maltese was not admitted to the hospital yesterday. He was taken there and discharged, not requiring medical attention.

I would assume that he would be here this morning, Mr. Maltese would be here, due to the fact he's no longer suffering a malady. I might need an adjournment if we have to go out and forcibly-- but renotify him to come into court if his presence is still required.

THE COURT: You'll probably get somebody to make sure he does know it.

THE COURT: Make sure that he does know he's expected.

MR. CUNNINGHAM: Right.

THE COURT: His wife might have thought he's totally ill. Let's get on with what we can now.

I find have a suppression motion at 11:00 o'clock tomorrow, which I hope I can finish in the morning, so we'll probably start at two on this case on Friday.

(The jury enters the jury box.)

THE COURT: Good morning, ladies and gentlemen.

Mr. Cunningham, are you ready to proceed?

MR. CUNNINGHAM: The Government calls as its next witness Mr. Frank Scinta.

FRANK SCINTA, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name.

THE WITNESS: Frank Scinta, S-c-i-n-t-a.

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Scinta, by whom are you employed, sir?

A Air Transport Association of America.

Q Will you tell us what the Air Transport Association is.

A It's the association of all the domestic airlines.

Q What actually do you mean by that?

A The various airlines are members of the Air Transport Association, which is funded by the airlines.

Q It acts as a trade association?

A Trade association.

Q Does it have any other functions other than the trade association? Does it regulate the industry in any way?

A No, but it's governed by the C.A.B.

Q The C.A.B. is--

A The Government agency which overlooks.

Q Civil Aeronautics Board?

A That's right.

Q What are your duties in the Air Transport Association?

A Investigation of stolen airline tickets, fraud investigations, investigation of travel agents.

Q Sir, is one of the functions of the A.T.C. or Air Transport Association to provide airline tickets to different agencies?

A This is correct. The Air Traffic Conference, which is a division of A.T.A. has the responsibility of appointing the travel agent and also providing the blank airline ticket stock as well as the plate used to validate the ticket.

Q I'm going to show you Government's Exhibit 6 and ask you if you can identify that document (handing).

A This is a ticket requisition which was prepared by Bayonne Travel, 219 Broadway, Bayonne, New Jersey, on May 11th, 1973, requesting 500 tickets.

MR. ROSNER: Your Honor, would your Honor note my continued objection on the basis there's no foundation for these documents?

THE COURT: I thought the foundation had been supplied after we heard Mr. Zackaroff yesterday.

MR. ROSNER: Hearsay, your Honor.

THE COURT: Go ahead.

A (Continuing) This requisition was received by the Air Traffic Conference and forwarded then to Rand McNally in Nashville, Tennessee.

Q Can you tell when these tickets were requisitioned?

A May 11, 1973.

Scinta-direct

Q Do you know whether or not those tickets were actually shipped to Bayonne?

A They were shipped on May 23, 1973.

MR. ROSNER: Objection, unless the witness has personal knowledge, your Honor. If he's just reading from a document in evidence, I would object.

THE COURT: Does the document show the date?

THE WITNESS: That's correct.

THE COURT: If it's from a document in evidence, I'll overrule the objection.

Q Sir, did there come a time when you in your official capacity with the Air Transport Association learned that these tickets did not arrive at the Bayonne Travel Agency?

A We received several phone calls from various airlines indicating--

MR. ROSNER: Objection, unless the witness has personal knowledge. When he says, "We received," is no indication--

THE COURT: Sustained.

MR. CUNNINGHAM: Might I have one moment.

THE COURT: Yes.

(Pause)

Q Do you know from your own knowledge as to whether or not these tickets arrived at the Bayonne Travel Agency?

A I do.

Q How did you find out these tickets did not arrive at the agency? What steps were taken when the tickets did not arrive?

MR. ROSNER: Objection. Two questions here.

THE COURT: Answer the second one first.

THE WITNESS: Repeat it.

Q What steps did you take in the normal course of events when you've been advised that tickets have not arrived at a travel agency?

A We check with our office who controls the ticket requisitions, found out the signature copy of the ticket requisition, which is made by the travel agency had not been received. Then we contacted Rand McNally, found out the tickets had been shipped.

Then we contacted Wings & Wheels and found out that the tickets had been reported as missing.

Q Sir, what instigated this search to look for these tickets?

A Usually it's established on the ticket.

Q When you say that--

A Flight coupons used by the passenger. Airlines, in turn, had been looking for the moneys for the tickets found the tickets had never been sold by the travel agent.

MR. ROSNER: Objection, move to strike all this testimony on the grounds it's all hearsay.

THE COURT: I suppose we can bring in a bunch of witnesses to establish each step, but I'll overrule the objection.

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[illegible]
ministerial
actions,
like these.
[illegible]
surveillance
agents who
to look
for.

Q Mr. Scinta, what steps are taken in the normal course of events when a ticket is surrendered to an airline for travel as far as the current procedures are concerned?

A Following the flight the tickets for that flight are sent to their individual revenue accounting offices and at that point there's a match setup within the airline system; the flight coupon for usage is matched against the auditor coupon, which is the document used for payment of the ticket.

When they receive the order coupon, they know they've received the money and the flight coupons come in later.

I In this situation the flight coupons come and the auditor's coupons were not received from the travel agent; therefore they're not paid for, the tickets.

Q This is a system of double checking when you're talking about flight coupons and auditor's coupons; is that correct?

A That's correct.

Q The auditor's coupon is retained by the travel agent when he writes the ticket?

A No, the travel agent must report their sales every ten days to a bank which we designate.

This report that they prepare lists the tickets by number and by the amount.

The auditor coupon accompanies that sales report to a bank which we designate. In this instance the bank was in Boston, Massachusetts.

Q I'm going to show you Government's Exhibit 11 (handing to witness). I'm asking you if you can identify that document.

A That's a ticket requisition submitted by Greenwald Travel Service, 114 Market Street, Clifton, New Jersey, on April 12th, 1973, requesting 1500 tickets.

Q Sir, do you know whether or not those tickets were sent to the travel agency?

MR. ROSNER: Objection unless he has

personal knowledge.

THE COURT: Does it show on the document?

THE WITNESS: The document shows April 24, '73, the order was filled and shipped.

Q Now, sir, did you learn in your official capacity whether these tickets ever arrived?

A Yes.

Q Did they arrive at their destination?

A No.

Q Can you tell us what steps you took to ascertain that?

A We followed the same procedure I pointed out before, checking to see whether the ticket requisition had been received from the travel agent, when it wasn't, we went to Rand McNally and then to Wings & Wheels.

Q Did you similarly receive reports on usage as to those tickets?

A We did.

Q Sir, I'm going to show you Government's Exhibits 1, 2, 3, 4 and 5 and ask if those are the tickets that are issued by the Air Transport Association.

A Exhibits 1 and 2 were tickets issued to Greenwald Travel, Clifton, New Jersey.

Exhibits 4 --- 3, 4, and 5 were tickets

issued to Bayonne Travel, Bayonne, New Jersey.

Q They were issued by the authorization of the Air Transport Association; is that correct?

A They were issued for sale and for preparation for sale by the travel agent which we have approved for selling these tickets.

Q Who was allowed to sell Air Transport Association tickets?

A Only the agents which we appoint, give authorization to sell.

Q If someone wished to be in the business of selling airline tickets, what steps would they have to take? Would they have to apply?

A They file applications for appointment. There's certain steps taken such as inspection of the place that tickets are going to be sold, the financial status of the company, corporation or partnership, whichever the case may be, and various recommendations from certain individuals.

Q Does the Air Transport Association keep a list of all its authorized agents?

A We do.

Q Do you know whether or not the defendant, Lawrence Alfano, is an authorized agent of the A.T.C.?

A He is not.

Q Sir, looking at the exhibits, take Exhibit 1 first of all, can you tell us what the value of that ticket is?

A $170.73.

Exhibit 2 is the same amount.

Q Ticket No. 3.

A $171.27.

Q No. 4?

A $171.27.

Q Ticket 5.

A $171.27.

Q If a person had purchased that ticket from an authorized travel agent, decided he would not wish to take the flight, could he return that ticket for a refund?

MR. ROSNER: Objection.

THE COURT: Overruled.

A He could return it to the travel agent from whom he purchased or from an airline.

Q What steps would you take if he was bringing it back to the ticket agent or the airline?

A If he would present this to the authorized travel agent from whom he purchased it, they would refund his money.

Q If he took it to the airline what steps would the airline take?

A If he took it to the airline whose plate appears on the ticket, they would in turn refund the ticket.

Q Sir, when tickets have been reported missing or stolen, is your organization taking any action with respect to those tickets?

A We issue a blacklist bulletin to all the airlines.

Q What is this blacklist bulletin?

A What's that?

Q What is this blacklist bulletin?

A A document which reflects the sequence of numbers of the tickets stolen, plus a summary of information surrounding the theft or means in which they were found missing.

Q Now, sir, are these numbers -- are these numbers of these tickets also put into a computer?

A Certain airlines have computer capability.

Q Now, sir, when a ticket is surrendered for refund, to an airline, what steps are supposed to be taken by the airline?

MR. ROSNER: Objection, your Honor.

THE COURT: Get a little foundation as to what he knows about airline practice.

Q Mr. Scintal how long have you been employed with the Air T ansport Association?

A Approximately seven years.

Q What has your function been during the seven years?

A For the most part, investigation of stolen airline tickets.

Q In the seven years, approximately how many stolen airline tickets have you investigated?

A Several thousand.

Q Were these from various airlines?

A These are from tickets which were stolen from, burglers of travel agencies and tickets that were missing in shipment.

Q Did the investigation that you conducted familiarize you with the procedures employed by the various airlines?

A That's correct.

Q Approximately how many airlines have you dealt with personally in the seven years you're with the A.T.A.?

A Twenty-five or thirty.

Q Are you familiar with the procedures utilized by the majority of those airlines?

A For the most part, yes.

Q Can you tell us from your experience then what is the basic procedures that are followed by the airlines when a request is made for refund?

MR. ROSNER: Objection, your Honor.

THE COURT: Overruled now.

A I've found in conducting investigations of this type that tickets have been returned to the airline for refund, refunds are made at the ticket counter. They have checked the hot list and found that tickets were stolen and the tickets were picked up at that point.

Q Is it normal procedure prior to giving a person a refund to check the hot list on those tickets?

MR. ROSNER: Objection, your Honor.

THE COURT: I'll let him answer.

A It is, because this is where I found a lot of my leads of people bringing back tickets for refund or have a ticket reissued.

MR. ROSNER: Objection, move to strike, as to what he experienced in other cases. The witness is testifying about generalities that have nothing to do with this case, your Honor.

THE COURT: It is appropriate as background on the case.

MR. CUNNINGHAM: With the Court's permission could I show those to the members of the jury?

THE COURT: Yes.

You're handing up four of the five tickets, is that right?

MR. CUNNINGHAM: Five.

Q When these tickets are mailed from the printer to the travel agencies, they are in blank; is that correct, sir?

A They are blank, the only thing they have on them is the ticket number.

Q Now, sir, what has to be done by the travel agent authorized to take this blank ticket and turn it into a valid ticket for passage?

A The travel agent inserts the plate on the right-hand corner of the ticket which identifies it as the travel agent.

Q Top right-hand corner?

A That's correct.

Q These tickets here would say, what names would be on the top of these tickets, do you know?

A On these tickets -- on the one I'm looking at, which ends 004, 8213, 866004 was issued for sale by Greenwald Travel, Clifton.

Q What is the stamp in the upper right-hand corner identify the seller of the ticket?

A (No response.)

Q On the ticket in front of you.

A Would you repeat that?

Q Surely. What is the stamp in the upper right-hand corner of the ticket that is in front of you?

A Central Tours, Incorporated, 22 East 29th Street, New York City, New York.

Q On the other tickets that you have in front of you is the name of Grimes Tours, isn't that correct, sir?

A Yes.

Q That would be put in, a metal plate that would be put into a machine?

Q Put into a validator, along with the airline plate. In this instance we have Eastern Airlines, the one I'm looking at.

Q What is this airline plate you're talking about?

A After we appoint a travel agent to give them our plate, each airline in turn gives them their plate in order to write the ticket. They are in fact an agent of that airline.

Q So the fact is... that your tickets could be used for any airline, is that correct?

A That's correct.

Q You need a plate in order to validate it for that airline?

A That's correct.

Q These tickets were issued to two agencies, issued to Bayonne Travel--

MR. ROSNER: Might I ask permission from Mr. Cunningham to refrain from leading the witness.

THE COURT: This is summary of testimony.

MR. CUNNINGHAM: I'm sorry.

THE COURT: Perhaps it's all right, but go to your question, please.

Q As to the tickets that were supposedly sent to Bayonne Travel, would any other travel agencies be authorized to utilize those tickets?

MR. ROSNER: Objection.

A No.

THE COURT: Overruled.

Q As to the tickets that were being sent to the Greenwald Tragel Agency, would anyone be authorized to use it?

A No.

Q Returning to the ticket that was issued by Central Tours, 22 East 29th Street--

MR. ROSNER: Might we have an exhibit number, your Honor?

THE COURT: On the back is the exhibit number, Mr. Scinta. You took it out of one of the envelopes.

Q Let us identify by the number of the ticket so we don't get confused, 8213866044.

THE COURT: All right.

MR. ROSNER: What exhibit number is that, Mr. Cunningham?

MR. CUNNINGHAM: Excuse me.

MR. ROSNER: What exhibit number?

MR. CUNNINGHAM: Either Exhibit No. 1 or 2.

Q Sir, as far as the ticket on Central Tours is concerned, was that ticket validated by Central Tours?

A No.

THE COURT: He can't tell that, can he?

MR. CUNNINGHAM: Yes, I believe he can, your Honor.

THE COURT: All right, he's subject to cross-examination.

Q Now, sir, did you have contact with Central Tours in 1972?

A July 6th, 1972, I talked with Mr. Morton Wohlberger, the owner of Central Tours. I had occasion to pick up the plate for that agency on that date.

Q Do you have that plate with you right now?

A I do.

(A plate is handed to Mr. Cunningham by the witness.)

THE CLERK: Plate marked Government's Exhibit 13 for identification.

(So marked)

Q Would you tell the Court and jury why you had occasion to pick up that--

MR. ROSNER: Objection. Might we approach the bench?

THE COURT: All right.

(Side bar.)

MR. ROSNER: Your Honor, the Court has ready permitted this witness to testify extensively to hearsay, which in my judgment is improper. What he's about to testify is obviously also going to be hearsay.

THE COURT: The questioning is so wide you can't tell.

MR. ROSNER: I submit the probability is there's going to be some allegation of misconduct which obviously is not improper, but prejudicial to the defendant in addition of my own knowledge because we represent the building in which Central Tours either was or is located.

THE COURT: What you want to establish is that the agency was terminated--

MR. CUNNINGHAM: It wasn't. There is no allegation of impropriety. I'll make an offer of proof on the record. Mr. Scinta is going to testify that the bank which these people have to report to every ten days formerly was located in Newark and that there came a time in the summer of 1972 where Central Tours' bank was changed from Newark to Bayonne -- to Boston. They had to take the plate back from them and gave them a new plate at this time. We have tickets being written on his plate one year after it was in the possession of Mr. Scinta. It's quite relevant to the fact this is a counterfeit.

THE COURT: Don't ask him why. Ask him at the same time he issued at that time another plate and what the difference was between the two plates.

MR. ROSNER: Might I respond?

THE COURT: Yes.

MR. ROSNER: First of all, Mr. Cunningham just used the word "counterfeit," which obviously is a word denoting legal impropriety if not a crime.

Secondly, Mr. Cunningham as the representative of the Government has indicated in the bill of particulars in response to our request that the Government does not know who stole the tickets or who issued the tickets or from whom Mr. Alfano received them. Thus, if your Honor permits this testimony, the clear inference to the jury is that Mr. Alfano is involved in counterfeiting the ticket, in producing the ticket as well as probably in the theft. It's in the bill of particulars as well as the indictment. I specifically except.

THE COURT: You've gone a long way.

MR. ROSNER: What is the purpose of proving an alleged counterfeit? They have what they believe -- I think it's legally improper. I have taken my objection, prove that the blanks themselves were stolen. That's all they have to prove. Now they're going to prove counterfeit. They've already indicated in the bill of particulars as well as in the indictment that--

THE COURT: It depended on knowledge that he had at the time.

MR. ROSNER: How can that be hooked up to him, your Honor? There's no allegation -- the Government specifically abjured any allegation that he was involved in the theft.

THE COURT: Whether he knew these were stolen.

MR. ROSNER: How does he establish?

(In open court)

Q Sir, I believe you testified before that the A.T.C. required the travel agencies to send their money in to a clearing bank once every ten days.

A That's correct.

Q Referring to Central Tours, prior to 1972 where was the central bank located for Central Tours?

A In 1972 we had a contract with the Chase

Manhattan Bank in New York City for handling the travel agents in this area. We didn't review the contract, and it was picked up by a bank in Boston and each travel agent was given another plate which made it a little different than the one they had because on the New York bank there was an "N" in the plate block. On the new plate there was a "B" reflecting Boston.

Q On the tickets formerly written on Central Tours there's a number at the bottom, 33590656N. Is this the "N" that you're referring to?

A That's correct.

Q The "N" means what on that ticket?

A The "N" means the New York bank to the industry.

Q Now, you say subsequently they changed from the New York bank to another bank?

A The bank is in Boston, yes.

Q Did that necessitate new plates?

A New plates.

Q What would the last number be, or the last letter be, on the new plate?

A "B."

Q Did there come a time when you issued Central Tours a new plate?

A That's correct.

Q At the same time did you take back the old plate?

A I took back the old plate. The circumstances of my getting that plate are not connected with this case, but I did pick up the plate.

Q When did you pick up the plate?

A On July 6th, 1972.

Q That was prior to the issuance date of these tickets in front of you?

A The date I have on this ticket in front of me, 0444, is 5/'73.

Q Can you explain how the stamp would get on these tickets?

A It would have to be a counterfeit.

MR. ROSNER: Objection, move to strike, move for mistrial.

THE COURT: Let me see.

Does the travel agent have more than one plate?

THE WITNESS: No.

THE COURT: I'll overrule the objection.

MR. CUNNINGHAM: I have no further questions, your Honor.

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CROSS EXAMINATION

BY MR. ROSNER:

Q Mr. Scinta, I ask you to look at Government's Exhibits 1 through 5, 6 and 11. Those are all the exhibits Mr. Cunningham put before you with the exception of Exhibit 13; is that correct?

A That's correct.

Q Did you look at them?

A Yes.

Q Did you testify of your own personal knowledge that Government's Exhibits 1 through 5 were in fact shipped by the two -- to Bayonne Travel or Greenwald Travel?

A No.

Q You have no personal knowledge of that at all, do you?

A No.

Q Do you know who prepared Exhibit 6 and 11?

A Other than the information on here,it would be the travel agent.

Q You have no knowledge as to who prepared that, do you?

A No.

Q You assumed that because the travel agent's name is on there the travel agent prepared it?

A That's correct.

Q Similarly, you assumed that because certain numbers appear on there, they were shipped?

A That's correct.

Q Do you have any personal knowledge that the entirety of Exhibits 1 through 5 -- when I say "the entirety," I'm not misleading you, I assume there are counterparts for the different aspects of the flight plus the cover; is that correct?

A You mean the complete ticket?

Q O.K.

A Right.

Q I assume a complete ticket is the cover and the counterparts for the different portions of a flight.

A I have a blank ticket.

Q Great. This is what we would call a complete ticket, or what you would call a complete ticket?

A Complete.

Q This only has one coupon which would mean it would be good only for one flitht?

A That's correct.

Q Is that the way it's shipped to the agent?

A That's correct.

Q How does the agent know how many flights the customer who comes in a month from now is going to require?

A He not only requisitions one ticket, he requisitions many. One flight coupon, two flight coupons, three flight coupons, four flight coupons -- he makes his own judgment of how many tickets he needs.

Q With respect to the full tickets, of which Government Exhibits 1 through 5 are merely a portion, the full flight meaning what you just have shown me.

A Right.

Q The cover and all the other counterparts, do you have any personal knowledge that they never arrived at Greenwald Travel or Bayonne Travel?

A (No response.)

Q You're pausing. When I say personal knowledge, personal knowledge as distinguished from information you received from other people.

A I have had occasion to play a role in this to a minor extent.

Q Do you have any personal knowledge that they never arrived or is all your information derived from other people?

A Through a chain of command of our office, may I answer that way, that's at the time this thing happened.

Q In other words, you've got reports from different people?

A That's correct.

Q You have no personal knowledge they never arrived there?

A No.

Q On Government Exhibits 1 through 5, there are two travel agents' names; is that correct?

A That's correct.

Q Central Tours?

A Correct.

Q And Grimes Travel, is it?

A Correct.

Q Are both of those agencies A.T.A. or A.T.C. authorized agencies?

A They are.

Q Both still in existence today?

A Well, I know Central Tours is. I'm not sure whether Grimes is. I believe that they are.

Q Now, you've testified, I believe, that each travel agent gets a plate.

A That's correct.

Q Issued by the A.T.A. or A.T.C.?

A A.T.C.

Q You state that Exhibit 13 is the plate that was issued for Central Tours?

A That's correct.

Q What happened to the plate issued to Grimes?

A I don't know.

Q The circumstances are, are they not, the travel agency that is large enough has several plates?

Q I have no knowledge whether more than one plate. In fact, situations that I have been in, I don't recall seeing more than one plate in a travel agency.

Q How about a travel agency with multiple offices?

A You have a home office and branches. You would have different numbers, different plates for each office.

Q In every instance?

A Use Liberty Travel for example, twenty-five offices, twenty-five different plates. If the office is located -- the same plate cannot be used in offices spread across the city. There's a different plate, different number, different address.

Q Suppose a travel agency had an office within ten blocks from each other.

A No way.

Q Pardon?

THE COURT: Let him finish the question.

A Separate.

Q Separate plates?

A Separate plates.

Q Different numbers?

A Different numbers.

Q Each office would only have one plate no matter how many employees they have or tickets?

A To the best of my knowledge.

Q When you say to the best of your knowledge, is it possible they could have had more than one plate?

A As I say, I don't recall seeing more than one plate in each office.

Q But it's possible?

A The only situation would be more than one if they lost one and got another or if it was stolen.

Q You physically picked up Government's Exhibit 13?

A I did. I made these notes the date I picked it up (indicating). I visited Central Tours.

Q Did you pick up Grimes's plate also?

A No, sir.

Q Didn't they change from New York to a Boston Bank?

A That's correct.

Q The plate was not picked up?

A On the occasion I picked up Central Tours was the occasion this plate was used on another stolen ticket.

THE COURT: Strike that out. That's not responsive.

MR. ROSNER: Thank you, your Honor.

THE COURT: The jury please disregard it.

MR. ROSNER: Could the court reporter read my last question.

(Record read)

THE COURT: That meaning the Grimes plate.

THE WITNESS: As far as I know.

Q It was not picket up?

A No.

Q Didn't you say they changed the bank from New York to Boston?

A The procedure was not requiring them to return the plate.

Q I ask you to look at Government's Exhibits 3, 4, and 5. Prior to July of 1972, what would the letter at the end of Grimes Travel Agency's serial number be?

A If it's in New York, it's an "N."

Q Was it in New York?

A Yes.

Q Was it in New York?

A According to that plate.

Q I ask you to look at Government's Exhibit 3, 4, and 5 and tell the Court and jury what the designation of the Grimes serial number is on those tickets.

A "B."

Q What happened to the Grimes plate with the letter "N"?

A I don't know.

Q They still have it?

A I don't know.

Q You've testified, I believe, that only A.T.A. or A.T.C. authorized agents are authorized to use those tickets when they come in in blank, is that correct?

A That's correct.

Q I think you also testified, did you not, that tickets 1 and 2 could only be used by Greenwald and 3.4.5, can only be used by Bayonne?

A That's correct.

Q That, of course, assumes that the documentation in front of you is accurate, right?

A That's correct.

Q You have no knowledge that those were really sent to Bayonne or Greenwald?

A That's correct.

Q You've been with the Air Transporters, or whatever it is, Air Transportation of America, for a long time?

A Approximately seven years.

Q Talked to a lot of travel agents?

A Lot of travel agents.

Q You regulate travel agents as well, don't you?

A That's correct.

Q You've heard of travel agents running short of tickets before they get a shipment, asking another agency to send over some tickets?

A (No response)

Q Haven't you?

A No.

Q You never heard that?

A No.

Q You know it's not done?

MR. CUNNINGHAM: I object to the question, your Honor.

THE COURT: Mr. Rosner has been asking about personal knowledge. I'm not sure whether he wants personal knowledge now or something else. Tell him what you mean by he knows it's not done.

MR. ROSNER: Does he know of his own personal knowledge it's not done.

A If I can explain this my own way--

MR. ROSNER: The question is very clear.

THE COURT: See if you can answer yes or no. Mr. Cunningham can go into redirect.

A I have no knowledge.

Q You have no knowledge it's ever been done?

A No.

Q Do you have any information as to it ever having been done?

A No.

Q Nobody has ever told you of one agent, as an accommodation to another agent, giving him a batch of tickets, blanks, so they can continue writing up orders?

A No.

Q You testified, I believe, to a process by which the ticket that the passenger uses to get on board the plane.

A Right.

Q Is taken by the airline agents at the terminal.

A Right.

Q Sent to some central location and matched up with what I think you call an audit coupon.

A That's right.

Q You also testified, I believe, that when tickets are reported lost or stolen or missing, the conference or association issues what you call the black list.

A That's correct.

Q The black list bulletin is sent to all the airlines.

A That's correct.

Q Can you tell us of your own personal knowledge when tickets 1 through 5, Government Exhibit 1 through 5, were reported missing?

A I don't have my bulletin with me.

Q Pardon?

A I don't have the bulletin with me.

Q You have no knowledge as to when they were reported missing?

A I couldn't approximate the date without the bulletin.

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A I don't have my bulletin with me.

Q Pardon?

A I don't have the bulletin with me.

Q You have no knowledge as to when they were reported missing?

A I couldn't approximate the date without the bulletin.

Q Your direct testimony seemed to indicate that if somebody had presented these five tickets for refund (indicating) the airline would have rejected on the basis that they were reported lost or stolen.

A Not in every instance.

Q So you don't know in this instance whether they would or would not have rejected?

A I don't think the bulletin was available--

Q Just yes or no.

A I don't know.

Q You don't know?

A Right.

Q Because you don't know when the bulletin was available?

A That's correct.

Q Could you tell us when the bulletin was available?

A I don't know.

Q So you don't know whether they would have been rejected for passage either?

A I don't know.

Q The bulletin you described is the basis for airline, not only rejecting a ticket that is presented for refund, but is also used to reject the ticket that is presented for passage, is that correct?

A That's correct.

Q So that if the bulletin was available when anyone of these five tickets were presented for passage, the bulletin would have indicated that and the airline could have rejected the ticket?

A That's correct.

Q For passage as well as for refund?

A That's correct.

Q How soon after tickets are reported missing or lost or stolen does a bulletin come out?

A As soon as we find out about it.

Q Does it come out on a daily basis?

A Same day as we find out about it.

Q I show you Government's Exhibit 22. You tell us when the tickets were allegedly missing or lost or stolen (handing to witness).

A According to this it would be June the 5th.

Q Well, I would direct your attention to this line (indicating), which says, "Where or how did O.S. or D. occur?" What is "O.S. or D."?

A I don't know what this means. What does it mean?

Q Pardon?

A I don't know.

Q I'm asking you. You've been involved in these investigations for this.

A Not this.

Q It says, "Over, Short, Damages," Wings and Wheels, Inc. They were the ones that shipped the ticket aren't they?

A That's correct.

Q You don't know that, you assume that?

A From this.

Q You've never seen one of these before?

A Never before.

Q Never before?

A That's correct.

Q Seven years?

A That's correct.

Q Wouldn't that indicate that they were determined to be lost, stolen or missing on April 26th?

A It would appear that way.

Q And it was reported on June 5th?

A That's correct.

Q Almost two weeks, right?

A Two months.

Q I'm sorry, two months, a month and a half.

A Right.

Q So they were missing on April 26th and it wasn't reported until June 5th?

A That's correct.

Q Wings and Wheels would report it to the conference or association?

A It was our office that generated the inquiry into this.

Q Do you know when?

A No.

Q I show you Government's Exhibit 10 (handing to the witness) and ask you if, by looking at this, you can tell when the loss, theft occurred in this instance.

A May 25th, '73.

Q When was it reported?

A June 7th, '73.

Q That's two weeks?

A Two months--

Q No, May to June is only--

A That's right.

Q In one instance it took a month and a half to report it. The loss or the theft and in the other instance it took two weeks to report it.

A That's correct.

Q It is reasonable to assume you got the report from Wings & Wheels as to these two alleged losses or thefts on or about June 5th, on or about June 7th?

A That's correct.

Q Is it also reasonable to assume that within twenty-four hours the association of the conference issued its bulletin or blacklist?

A That would be right.

Q That would be right.

So the airlines were notified that if tickets contained in these two shipments were presented either for refund or passage, they should be rejected?

A That's correct.

Q Can you tell the Court and jury when Exhibit 1 was presented for passage?

A June 24th.

Q That's about two weeks after the bulletin would have been issued?

A Well, I don't know the date of the bulletin.

Q But you said it would have been issued within twenty-four hours after the report. The report was June 5th or June 7th.

A That's correct.

Q Can you tell us when Government Exhibit 2 would have been presented for passage?

A June 24th.

Q Same day?

A That's correct.

Q Can you tell us when Government Exhibit 3 would have been presented for passage?

A July 23.

Q July 23?

A That's correct.

Q That's a month and a half after the report of loss or theft?

A That's correct.

Q How about Government Exhibit 4.

A July 23.

Q Same date?

A That's correct.

Q How about Government Exhibit 5?

A July 23.

Q Same date.

So that the report of theft was not made between two weeks and a month and a half; is that correct?

A If we were notified on June 7th--

Q No, no, the report was not made to you by the shipper, Wings & Wheels?

A Right.

Q For between two weeks and one and a half months of the loss or theft?

A Right.

Q Your bulletin came out within twenty-four to forty-eight hours?

A That's correct.

Q The tickets were presented for passage or refund for between two weeks and one and a half months?

A That's correct.

Q So in each instance there was a lapse of either a month to three months between the time of the alleged loss or the alleged theft and the time the tickets were presented for passage; is that correct?

A That's correct.

Q You've testified, Mr. Scinta, that Government Exhibits 1 and 2 have a value of $170 and change.

A That's correct.

Q Government's Exhibits 3, 4 and 5 have a value of $171 and change?

A That's correct.

Q What date do you say they had the values you ascribed to them?

A Without having the tariffs in front of me, I presume these fairs would go with the tariff of that date.

Scinta-cross

Q Oh, so you don't know that?

A No.

Q You're just reading it off of the tickets?

A That's correct.

Q If something other than an authorized A.T.A. or A.T.C agent in fact completed those tickets, those tickets would be incorrect or would likely be incorrect, is that correct?

A That's possible, yes.

Q It's possible?

A Right.

Q Take a look at Governments Exhibits 1, 2, 3, 4 and 5. You've been investigating cases of lost or stolen tickets or alleged lost and stolen tickets for the last several years?

A Yes.

Q Without the knowledge or information you got as a consequence of the reports made to you as an employee of the association, of the conference, looking at those tickets on their face, could you tell that they were lost or stolen?

A No.

Q No way.

MR. ROSNER: I have no further questions,

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your Honor.

THE COURT: You may have redirect.

MR. CUNNINGHAM: At this time I ask that Government's Exhibit 13 be received in evidence.

THE COURT: Any objection, Mr. Rosner?

MR. ROSNER: Yes.

THE COURT: Come to side bar.

(Side bar)

THE COURT: What's the objection?

MR. ROSNER: First of all, your Honor, the objection is that (a), it's not connected with my client, (b) it's proof of another crime that my client is not charged with.

No. 3, and I say I'm uneducated, but I took a quick look, it looks to me like the printing was erased on Exhibit 13 is identical to the printing on the tickets. I looked at the dropped 9 at the bottom row. There's a bottom row, dropped 9 on 1 and 2. In addition, everything, virtually everything this witness has testified to, your Honor, is hearsay.

THE COURT: He's certainly testified that he actually picked this up. Whether it helps you or helps the Government is proper evidence anyway.

MR. ROSNER: I respectfully except, your Honor.

(In open court)

THE CLERK: Exhibit 13 so marked, in evidence.

(So marked)

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q I believe you testified the blacklist is also utilized when passengers are checking in for flights.

A That's correct.

Q Do you know from your own knowledge whether or not these blacklists are utilized on the New York to Florida run?

A They are available. Whether used in each and every instance, I don't know.

Q From your investigation of various airlines, various conduct of various airlines, have you been able to ascertain a pattern of whether or not the blacklists are used on certain routes?

MR. ROSNER: Objection, your Honor.

THE COURT: Overruled.

MR. ROSNER: Might I state the grounds?

THE COURT: What are you asking?

MR. ROSNER: Might I state the ground for my objection.

THE COURT: All right.

MR. ROSNER: First of all, Mr. Cunningham is leading the witness.

Second of all, the witness already answered he has no knowledge with respect to whether they are used by the ticket agents on the Florida to New York run or the New York to Florida run.

I specifically submit what he's trying to do now is not only lead him, but impeach him.

THE COURT: He has a right to do that, too.

MR. ROSNER: I don't think he can impeach--

THE COURT: He's trying to find out whether the people who take your tickets when you go to an airline look, stop and look through a blacklist on each passenger.

MR. ROSNER: Your Honor, Exhibits 1 through 5 are on the New York to Florida run. In response to one of Mr. Cunningham's questions, the witness already testified that he knew that they were available but he had no knowledge with respect to their use. What's he trying to do, impeach that now?

THE COURT: What's your question?

MR. CUNNINGHAM: I'm trying to find out if Mr. Scinta knows whether or not the blacklist is utilized by the air carriers on the New York to Florida run.

MR. ROSNER: Asked and answered.

THE COURT: The objection is overruled.

Q Answer the question, sir.

A Yes, based on the number of tickets I picked up, from this one airline, I find that many tickets apparently had slipped through on the Florida run.

MR. ROSNER: Objection. Move to strike, your Honor. Might I approach the bench.

THE COURT: Yes.

(Side bar)

MR. ROSNER: The Government has now started to introduce evidence of other criminal acts.

THE COURT: Such as--

MR. ROSNER: Other tickets, the clear implication they're stolen tickets. I specifically move for a mistrial, specifically indicate to the Court that Mr. Cunningham is doing this intentionally. He has impeached his own witness.

THE COURT: I don't think your objection is made in good faith. You know perfectly well--

MR. ROSNER: Utmost good faith.

THE COURT: You know perfectly well you've traveled by air, know when you go to the counter, hand in your ticket on an airplane, nobody goes through 25 lists of blacklists. You're trying to hoodwink the jury.

MR. ROSNER: I specifically except to your Honor's remark.

THE COURT: Yes.

MR. ROSNER: I think it's uncalled for.

(In open court)

Q From your own experience as an investigator, do you know whether or not as a matter of course the airlines from New York to Florida run go through each and every one of these blacklists before permitting a person to fly?

A I do not know.

MR. CUNNINGHAM: No further questions.

THE COURT: Any recross?

MR. ROSNER: None, your Honor.

THE COURT: You can step down.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: We'll take a short recess now. The jury is to go back to the jury room. Please don't talk about the case.

(The jury leaves the courtroom.)

(Recess)

THE COURT: Are we ready?

MR. CUNNINGHAM: Yes, your Honor. I'm going to be encountering difficulty today. I was planning on having Mr. Sampogne testify, Mr. Maltese testify. I planned on having Mr. Kilgallon testify. Apparently none of the three individuals is here, although they were all subject to subpoenas.

THE COURT: Mr. Sampogne was here yesterday. Where is he?

MR. CUNNINGHAM: I guess he decided not to come in.

THE COURT: Didn't he have a subpoena that directed him?

MR. CUNNINGHAM: Yes.

Mr. Maltese had one yesterday when he checked into the hospital. He saw fit not to come today.

Mr. Kilgallon came to my office. I told

him to specifically be here at ten o'clock this morning. The agents are trying now to get phone calls.

THE COURT: Are you going to have somebody from Greenwald and the other company?

MR. CUNNINGHAM: I planned having them come in tomorrow. I'm trying to get them this afternoon. Mr. Grimes from Grimes Travel and Mr. Wohlberger from Central Tours scheduled to come in. Perhaps what we might do--

THE COURT: Do you have one witness ready now?

MR. CUNNINGHAM: I have one witness.

I'm going to put some grand jury testimony in. I would not want the testimony to go in right now, but Miss Ng is present in court, the grand jury stenographer. She can put the grand jury testimony into evidence. Also, I would like to recall--

THE COURT: This is Mr. Alfano's grand jury testimony?

MR. CUNNINGHAM: Yes. I would like to recall Mr. Zackaroff for one last question on one additional document.

THE COURT: If your other testimony isn't ready, you may have to put in the Alfano testimony now so we're moving.

MR. CUNNINGHAM: When it goes in, it will be about three -- reading about three or four pages, very brief.

One subject I think we ought to bring up now is the fact about the tapes. Does defense counsel wish for the originals of the tape recording to be produced?

THE COURT: I presume he does.

MR. ROSNER: I object to the offer and the receipt of any of the tapes, originals, copies or transcripts.

THE COURT: These are tapes of Mr. Alfano?

MR. CUNNINGHAM: Mr. Alfano.

THE COURT: What's the objection?

MR. ROSNER: First of all, with respect to the Court's ruling on the motion to suppress, the Court determined that we did not have standing; therefore denied the pretrial hearing and the pretrial motion. On that basis I object.

Secondly, the tape recording, at least the one that I have a transcript of, was made some time in August, which is subsequent to the charges contained in the indictment.

THE COURT: Most admissions occur, sometimes that come from a defendant, are after an arrest.

MR. ROSNER: They did not make reference to the five tickets referred to in the indictment. On the contrary, they refer, if anything, to other tickets. Therefore, they are proof, if anything, of a crime subsequent to the crimes charged in the indictment.

I would specifically submit, your Honor, that the law -- not only in this circuit, but generally in the United States, by decisions of the law, by treatises, indicate that under certain circumstances, in the exercise of the discretion of the court, proof of prior criminal acts, not amounting --

THE COURT: Proof of other criminal acts, I think it is. Go ahead.

MR. ROSNER: I would specifically refer you to the decision of the Court of Appeals, 1973. U.S. v. Brettholz, 485 F.2d 483, where they specifically said the law in this circuit is that evidence of prior similar acts is admissible for purposes other than to show the criminal character or disposition of the defendant; that is, admissible if offered to prove knowledge, intent or design.

Similarly, the Fifth Circuit in U.S. v. Franklin, 471 F.2d 1299, 1973 decision, refers specifically to prior criminal acts.

Additionally, your Honor--

THE COURT: Was there any case that excludes evidence of subsequent similar acts? The Deaton case in this circuit says other acts are admissible.

MR. ROSNER: Additionally, your Honor, I think what the Government has proposed here falls squarely within the opinion of the Eighth Circuit, which is now aged in Niederlucke v. U.S., 21 F.2d 511, where they try to establish knowledge as a requisite in a prosecution for interstate transportation in interstate commerce of stolen motor vehicles by proof of a subsequent alleged criminal act and the court in Niederlucke, very well reasoned opinion going to the heart of the whole concept of proof of prior similar acts, excluded it.

Finally, your Honor, McCormick handbook

Law of Evidence, indicates that the problem is not one, as McCormick says, of pigeonholing, but of balancing.

This may be, your Honor, anticipatory of what I expect the Government will offer through other witnesses that I have indicated they intend to call and this grand jury testimony and 3500 material as furnished to me yesterday.

As I anticipate the Government's course in this matter, through the witnesses Kilgallon, Maltese, and perhaps others, the Government intends to prove or attempt to prove acts by the defendant with respect to ten tickets subsequent to the five charged in the indictment.

It's got to be, your Honor, what they're going to be doing here is proving ten alleged subsequent criminal acts by the defendant in respect of the possession of stolen airline tickets alleged in the indictment.

The obvious prejudice to the defendant is so overwhelming as distinguished from the probative value that as McCormick indicates, and I quote, "The leeway of discretion lies rather in the opposite direction empowering the judge to exclude the other crimes of evidence even when it has substantive, substantial independent relevancy, if in his judgment the probative value for this purpose is outweighed by the danger it will stir such passion in the jury as to sweep them beyond a rational consideraton of guilt or innocence of the crime on trial."

Here I would also add, your Honor, as your Honor may recall, subsequent to an initial motion to dismiss the indictment, originally filed, which was 74-4818, the Government superseded with the indictment on trial before your Honor, 75-298, indeed, the evidence of the subsequent alleged criminal act was available to the Government when they filed the superseding indictment and they determined in their wisdom and in their prosecutorial discretion, although they obviously had the grand jury testimony and the 3500 material that I am alluding to, they determined not to file charges with respect of those ten other tickets.

I think, having made that choice, within the context of Brettholz, Niederlucke, McCormick and the other cases, the proof of so-called other crimes, particularly subsequent --not prior crimes-- not leading to conviction, should be excluded.

THE COURT: What have you to say, Mr. Cunningham?

MR. CUNNINGHAM: Your Honor, this shows a reference in the conversation of Mr. Alfano on August 7th, 1973, where he makes reference to the crime for which he is charged.

In particular, I'm referring to the fact that tickets in Counts 1 and 2 of the indictment, Government's Exhibits 1 and 2, refer to the tickets of Mr. T. Alfano and Mrs. R. Alfano. There's a portion of the conversation, quite clear, no problem.

"I just came back myself. I took my whole family. I would never do that if I didn't think it was sure. Right."

There's a direct reference in that conversation to the crime that is alleged.

If your Honor please, this shows that this was not an isolated example. This was not a mistake, not an error. The defendant definitely had knowledge the tickets he was dealing with were stolen.

THE COURT: I also understand you can infer back as well as forward and that if you are dealing with Mr. Alfano's knowledge in June and July, what he knew in August has value, if not impelling value.

MR. ROSNER: Your Honor, I would specifically suggest the Court, in Niederlucke, addressed itself to that specifically. It's the only case I have been able to find where the issue is put four-square to an appellate court: Can you use subsequent criminal acts not amounting to a conviction to show prior knowledge? The court in Niederlucke specifically said no.

THE COURT: The Second Circuit has its own rule of other similar acts.

MR. ROSNER: Additionally, your Honor, what Mr. Cunningham just read from in respect of the transcript is three lines from an eight-page transcript. If all he wants to prove is those three lines and they only prove Mr. Alfano himself used those two tickets, I would respectfully suggest that Alfano, that proof is already inferentially in the record.

B. It could be supplied by Mr. Alfano's grand jury testimony. He doesn't need this proof of the August tickets allegedly used by June, subsequent criminal acts, to prove Mr. Alfano used two tickets in July. He's already got that.

THE COURT: He's not confined to what he

has. He can put in more. Your Brettholz case has no relevance here. The Brettholz case was extrinsic evidence of prior criminal acts. This is the witness's own testimony. I can't conceive of any circumstance under which -- I can conceive of them -- but certainly this is not a circumstance under which statements of the witness -- of the defendant -- should be excluded.

MR. ROSNER: If anything, your Honor, this transcript proves subsequent criminal acts. Presumably, even there it doesn't establish the requisite element of knowledge, No. 1.

THE COURT: Knowledge has to be established on the whole record, not on just one piece of evidence.

MR. ROSNER: That's the case, your Honor, then I would suggest that even in this one particular, the prejudice by proving subsequent criminal acts involving the same crime far, far outweighs the slight evidence that this would add to the entire record the Government intends to make.

THE COURT: These prior situations relate to tickets in the same batch, so-called subsequent act?

MR. ROSNER: I don't know that and I don't think the Government knows that and I don't think they can prove it. I don't think they know where the alleged tickets that are involved in the conversation with June came from. They may be willing to argue--

THE COURT: I suppose that's so.

MR. ROSNER: They may be willing to argue they're from the same. Then you get into what Niederlucke clearly indicates is inference on inference to prove the final inference of knowledge.

THE COURT: And our Court of Appeals has specifically repudiated the idea you can't build an inference on an inference.

MR. ROSNER: Not in this instance, your Honor.

THE COURT: No, they haven't passed on this case yet.

Let's bring in the jury. The objection is overruled.

(The jury enters the jury box.)

THE COURT: It was a little longer recess than I planned on.

MR. CUNNINGHAM: The Government calls as its next witness Ms. Elizabeth Ng Young.

ELIZABETH A. NG YOUNG,

called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q Ms. Young, what is your occupation?

A Court reporter.

Q Were you so employed as a court reporter in February 1974?

A Yes, I was.

Q I refer you specifically to February 21, 1974. Could you tell us how you were employed on that date.

A I was employed as a grand jury reporter.

Q On February -- I show you this document (handing to witness). Can you tell us what that is, please.

A This is a transcript of the testimony I took in the grand jury on February 21, 1974 of the witness Lawrence Alfano.

Q Was the witness duly sworn?

A Yes, he was.

Q Is this a reproduction, to the best of your knowledge, of the conversation that took place in the grand jury?

A Yes, it is.

MR. CUNNINGHAM: I ask it be received in evidence.

THE COURT: Show the copy to Mr. Rosner.

MR. ROSNER: I have seen it.

THE CLERK: Transcript marked as Government's Exhibit 14 in evidence.

(So marked)

MR. CUNNINGHAM: No further questions.

THE COURT: Cross examination?

MR. ROSNER: No.

THE COURT: Step down.

(Witness excused)

MR. CUNNINGHAM: The Government calls -- recalls Mr. Zackaroff to the stand.

GEORGE ZACKAROFF, resumes the stand and testifies further as follows:

THE COURT: Mr. Zackaroff, you were sworn once, you're still under oath. You may take your seat.

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

THE CLERK: Document marked Government

Exhibit 15 for identification.

(So marked)

Q Mr. Zacharoff, I show you Government Exhibit 15 for identification. Can you tell us what that document is?

A This is an airway bill which is the consignee's memo which is a delivery receipt from the airline to the party who it's going to.

Q From this document can you tell whether or not the shipment of tickets actually was received in Newark?

MR. ROSNER: Objection, your honor.

THE COURT: No, he may answer it. Overruled.

A As to that question, by this document in front of me, it states that --

MR. ROSNER: Objection. It's not in evidence.

THE COURT: Correct.

Q Can you tell us what this document is in front of you?

A It's an airway bill saying that Wings & Wheel --

MR. ROSNER: Objection. It's not in evidence.

THE COURT: How did it come into your possession?

THE WITNESS: Into our possession? It's a signed receipt.

Q By?

A By one of my employees.

MR. CUNNINGHAM: I ask it be received in evidence.

THE COURT: Part of your regular business records?

THE WITNESS: Yes.

THE COURT: Let it be marked.

MR. ROSNER: Will the Court note my objection, your Honor.

THE COURT: Yes.

THE CLERK: Government's Exhibit 15 marked in evidence.

(So marked)

Q Continue, sir.

A As I stated, this is an airway bill from Wings & Wheels in Nashville to Wings & Wheels in Newark. It states that they shipped 14 cartons and 203 pounds.

Q Can you tell whether or not the package referred to in this documentation, Government's Exhibit 11, 20, 21, 12 and 22 on Greenwald Travel Service was contained in that delivery?

A Yes.

Q How can you tell?

A It is duly noted with the airway bill number in the body of the bill.

MR. CUNNINGHAM: I ask this be marked for identification.

THE CLERK: Document marked Government's Exhibit 16 for identification.

(So marked)

Q I show you this document. Can you tell what that document is?

A This is also a delivery receipt from the airlines.

Q That's a similar document to the one we just saw?

A Yes.

Q That is a receipt showing delivery?

A A delivery of X amount of packages.

Q That document is also kept in the normal course of business?

A Yes.

MR. CUNNINGHAM: I ask this be received into evidence.

THE COURT: Show it to Mr. Rosner.

(Mr. Cunningham complies.)

MR. ROSNER: Objection.

THE COURT: Side bar.

THE COURT: This is from Wings & Wheels.

MR. CUNNINGHAM: Yes.

THE COURT: Objection overruled.

(In open court)

THE CLERK: Government Exhibit 16 marked in evidence.

(So marked)

BY MR. CUNNINGHAM:

Q Now, sir, in looking at that document, can you tell whether or not the tickets sent to Bayonne Travel as represented on Government Exhibit 6, 8, 7, 9, and 10 were part of that shipment received in Newark?

A Yes, the corresponding bill number is on the bill.

MR. CUNNINGHAM: I have no further questions.

THE COURT: Cross-examination?

MR. ROSNER: Briefly, if I may.

THE COURT: Surely.

CROSS EXAMINATION

BY MR. ROSNER:

Q Mr. Zackaroff, I show yo Government's Exhibits

1 through 5. Do you have any knowledge of your own without just looking at those documents as to whether the entire tickets represented by 1 through 5 were ever shipped from Tennessee to New Jersey?

A By these tickets? No.

MR. ROSNER: No further questions, your Honor.

THE COURT: You can step down. Thank you.

MR. CUNNINGHAM: Could we have a side bar?

THE COURT: Yes.

(The following occurred side bar.)

MR. CUNNINGHAM: I have run out of witnesses.

THE COURT: You have the grand jury minutes to read and the tape to play.

MR. CUNNINGHAM: I can't play the tape until I lay the foundation for the tape. I imagine probably Mr. Rosner would wish to have originals brought over and have them carried in here. These are the same tapes we used in the Gallo trial, unless Mr. Rosner will consent to the use of the duplicate.

MR. ROSNER: My objection, your Honor, I can't consent to the usability of any of it.

THE COURT: All right.

MR. CUNNINGHAM: Are you willing to keep your objection to the admissibility of the tapes and consent of the introduction of duplicates in place of the originals? The problem on this, the originals are being stored in the District Attorney's office. Mr. Freundhold is present in the courthouse. He was the District Attorney that was in charge of this matter.

Mr. Hammerman is available on call to bring these documents over here. The problem is that they have been sealed by order of the Appellate Division. It would be easier than opening and resealing.

THE COURT: Weren't they opened?

MR. CUNNINGHAM: No, we have indicated they were duly made as they were--

MR. ROSNER: When you say duly made, you mean the duplicates were made from the originals?

MR. CUNNINGHAM: Right. There was a course of conduct. This was going on for three months. Every morning after the tapes were made they were--

THE COURT: Have you ever heard the originals?

MR. CUNNINGHAM: No.

MR. ROSNER: Who can testify the duplicates that you have--

MR. CUNNINGHAM: Mr. Freundhold can testify.

THE COURT: Is he an attorney? A District Attorney. Perhaps your Honor can call him up, if he represents he has compared the originals with the copies that Mr--

THE COURT: Can you get him to come up here? Put your name on the record.

MR. FREUNDLICH: David Freundlich, Assistant District Attorney, Suffolk County District Attorney's office.

MR. ROSNER: Perhaps if your Honor will permit me to ask Mr. Freundlich a couple of questons--

Did you hear the original tapes that are brought in?

MR. FREUNDLICH: No.

MR. ROSNER: You did not?

MR. FREUNDLICH: I did not. It was sealed immediately upon expiration.

MR. ROSNER: So you never made a comparison between the originals and copy?

MR. FREUNDLICH: Only to the original line sheets.

MR. ROSNER: The transcript?

MR. FREUNDLICH: Yes, which I did compare.

MR. ROSNER: Did you compare the transcript to the original tapes?

MR. FREUNDLICH: No, my office did that. I took home copies, listened to the copies of the tapes every night.

THE COURT: Can you get the officer who made the copies? Did you have him in the Gallo case?

MR. CUNNINGHAM: No.

MR. ROSNER: If your Honor will give me a couple of minutes, maybe it will facilitate.

THE COURT: I'll send the jury out.

(In open court.)

THE COURT: You can go back to the jury room for a few minutes, ladies and gentlemen. Still don't talk about the case.

(The jury leaves the courtroom.)

MR. ROSNER: In order to facilitate the Government's next offer, without waiving our objections to the admissibility of the original, the duplicate or any transcript of the tape, I think of August 7, 1973, we will not object to the Government's offering the duplicate as a duplicate original.

THE COURT: Thank you. I think that's

constructive.

There's another feature to this other crime that Mr. Rosner mentioned. I take it you're not offering anything to do with illegal gambling.

MR. CUNNINGHAM: No, your Honor.

MR. ROSNER: Might I ask your Honor how the Government intends to bifurcate the tape, exclude the aspect that has nothing to do with the airline ticket, to which we object in any event?

THE COURT: I haven't seen the transcript. I don't know what's in it.

MR. CUNNINGHAM: I would say this entire transcript should be admissible.

THE COURT: Do you have this transcript?

MR. ROSNER: Yes, your Honor.

THE COURT: Are you going to read the grand jury testimony?

MR. CUNNINGHAM: I would prefer not to read it at this time. As I said, the grand jury minutes testimony is going to be about two or three pages, about three or four minutes worth of reading.

MR. ROSNER: Under the new rules, your Honor, if the Government is going to read one portion of it--

THE COURT: You have a right to read it.

MR. ROSNER: I believe the entirety should be read at the same time. I think that's the concept of the completeness rule contained in the new Rules of Evidence.

MR. CUNNINGHAM: The defense counsel, if they wish to read it, I don't see any point in going through -- I'll be happy to show the Court the testimony that's going to be read and the testimony that's not going to be read.

THE COURT: Let me see how much there is.

MR. ROSNER: Not quite three pages.

MR. CUNNINGHAM: A lot of testimony about his attorney, whether or not he represented him in other actions. If he wishes to read it, he certainly may.

MR. ROSNER: Perhaps Mr. Cunningham if he wishes to indicate to me--

THE COURT: What part do you want to read?

MR. CUNNINGHAM. The portion dealing with airline tickets and some personal background on the defendant. I was going to start reading on page 4. First of all, I was going to start on page 2 and then switch over to page 4.

MR. ROSNER: Give me the line.

MR. CUNNINGHAM: Page 2, line 7 through 9. Page 4, line 12 through 25, all of page 5, page 6, lines 5 through 25. All of page 7, all of page 8, all of page 9, page 10, page 11, page 12 from line 2 to line 19, page 18, line 6 through line 25. Page 19, line 2 through 18; page 23, line 25; page 24, page 25, page 26, page 27, line 2.

MR. ROSNER: Anything else on page 7?

MR. CUNNINGHAM: No.

Page 28, line 16 through line 25, page 29, line 2 through line 6, and here is where I come into a problem, Judge, which can be resolved with counsel.

I wish to get in the testimony of Mr. Alfano where he talks about the fact that Mr. Sampogne, page 31, line 25, where he says, "No, my lips are very dry, well, he is my partner because we're partners in the house."

MR. ROSNER: What page?

MR. CUNNINGHAM: Page 31, line 25.

"No, my lips are very dry. Well, he is my partner because we're partners in the house, in the bar.

"Question: Did you start to say 'partner' or not?" That would be out.

MR. ROSNER: The one above that.

MR. CUNNINGHAM: I want to offer the portion, but I don't want to offer the portion about his attorney being Mr. Kaplin.

MR. ROSNER: Can I ask the relevancy of that?

THE COURT: If Mr. Sampogne testifies, I suppose it has some relevancy.

MR. ROSNER: My question is as to its relevancy, propriety of admissibility at this juncture, your Honor.

THE COURT: That may be why Mr. Cunningham wanted to introduce it later. It may explain why some of these people aren't here.

I would suppose you can do that by starting at "Bob who?" Lines 20 and 21 and then skipping to line 24. I would say when you read this you can go ahead and read what part you want and if Mr. Rosner wants anything that's left out, he can put it in in the middle of your reading, so we get continuity.

MR. ROSNER: Would your Honor give me a few minutes to go through this so I can indicate to Mr. Cunningham what portions I want as we go through?

THE COURT: Yes.

Are you ready to put on the tape?

MR. CUNNINGHAM: No.

THE COURT: Can the Assistant District Attorney prove it or do you need another witness?

MR. CUNNINGHAM: Yes, also a police officer can-- Well, I would like, before the tape is played, I have another witness which will be here at two o'clock which I think probably will be the more proper person to introduce the tape.

I apologize to the Court for not being ready to proceed. Three Government witnesses have failed to show.

THE COURT: Under the circumstances, unless we go ahead and read the grand jury minutes now--

MR. CUNNINGHAM: Your Honor--

THE COURT: We ought to adjourn until two.

MR. CUNNINGHAM: The case is not developed enough for these grand jury minutes to really be meaningful at this point. I would respectfully request that their introduction or their reading into evidence be delayed.

THE COURT: See if you can get hold of any of these witnesses between now and two o'clock.

MR. CUNNINGHAM: I certainly will.

We stand adjourned until two o'clock?

THE COURT: I think we'll have to do that, Mr. Rosner.

MR. ROSNER: I noticed your Honor's calendar. You had something scheduled for two o'clock.

THE COURT: I have a couple of probation matters, revocation hearings. Those can take fifteen minutes each. If we were adjourned until 1:30--

MR. CUNNINGHAM: I don't think so, your Honor.

MR. ROSNER: I think from my point of view, and I assume from the Government's point of view, they would rather not have a half hour, broken up by maybe a half hour to and an hour.

THE COURT: We'll adjourn until 2:15 to see if I can be ready.

MR. ROSNER: In the meantime, I will inform Mr. Cunningham what other portions of the grand jury testimony I would want him to offer at the same time.

THE COURT: Very well.

Bring in the jury.

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, we appear to have some delays that I'm satisfied are unavoidable. I'm going to adjourn now until 2:15. That will give you a longer lunch hour than usual.

I might tell you the schedule for the next few days is that tomorrow being Friday and I having a busy morning, we'll start at two in the afternoon and on Monday I'll ask you to be here at twelve. I'm not positive we can go ahead then, but you'll have until twelve anyway. In the meantime, remember, you have a long time, don't talk about the case, amongst yourselves or anybody else. Don't say anything to anybody who is in the courtroom now that's not a juror.

You're excused.

(The jury leaves the courtroom.)

THE COURT: Mr. Rosner, were you able to find out anything from the Appellate Division, if they'll put your two cases on together?

MR. ROSNER: I pursued what I understand was the message I received from the court yesterday and wrote the Appellate Division the first thing this morning and asked them to put it on as early in the calendar as possible. Quite candidly, I requested they put one argument between my first and second so I can readjust my thinking and not be arguing the same case both times.

THE COURT: Take what time is required there. If you're back at twelve, all right. If you can't be back at twelve, we'll start when you get back, at 2:15.

(Time noted: 12:15)

(Luncheon recess.)

AFTERNOON SESSION
(2:20 pm)

THE COURT: Have you a witness?

MR. CUNNINGHAM: I apologize to the Court, again for my tardiness. I was on the telephone with a Dr. Joseph Mangiaracina, who is the first cousin of the witness Maltese and also, apparently, his attending physician, and he said that he has exhibited symptoms which could be pertinent to a heart attack, I guess that's the best way to say it; angina problems.

He brought the man to the hospital yesterday. The cardiogram that they took or the angiogram they took did not show any great abnormality, but it seems these do not show up as abnormalities on the test the first time.

He has recommended bed rest for this individual and no movement whatsoever.

THE COURT: Can you send a doctor to see him?

MR. CUNNINGHAM: That would probably be advisable.

THE COURT: I suppose we should, Mr. Rosner, under the circumstances.

MR. ROSNER: I have no objection to the

Court appointing a physician to examine him.

MR. CUNNINGHAM: I also found out Mr. Kilgallon, who is a milkman, had fallen off his milk truck while working and Mr. Kilgallon is unable to attend because he's in the hospital or going to the hospital.

As to Mr. Sampogne, a telephone conversation was made to his wife and the answer, I believe, was that Mr. Sampogne has been at an all night card game and does not know where he is. He's not at home.

THE COURT: This is a remarkable series of coincidences.

MR. CUNNINGHAM: I'm receiving a call from Dr. Mangiaracina tomorrow morning. He's taking other blood tests.

I was wondering, perhaps, if the Metropolitan Correctional Facility would have a bed available. According to the doctor, he was waiting for a bed to open up at Long Island College Hospital. Perhaps there might be a bed for him at the Correctional Facility. I believe they have a medical facility available there.

THE COURT: I'm not sure. We can find out.

MR. CUNNINGHAM: As to Mr. Sampogne -- not

Sampogne, Mr. Kilgallon, I directed him -- he said he had to go to the doctor. He was in great pain. He was going to a doctor this afternoon, an appointment at two o'clock or 2:30.

I told him to be here tomorrow at two o'clock in the afternoon. He said that he would be here unless the doctor prohibited him from coming.

THE COURT: Are you going to rely on his coming?

MR. CUNNINGHAM: Excuse me?

THE COURT: Are you going to rely on his coming?

MR. CUNNINGHAM: I think in that case we're going to have to, your Honor.

THE COURT: What about Mr. Sampogne?

MR. CUNNINGHAM: Mr. Samphens, I guess -- excuse me, your Honor.

(Pause)

MR. CUNNINGHAM: You spoke to Mrs. Sampogne?

AGENT GIGOLIZZO: He was at a card game, she didn't know when he would be back. I left a message for him to appear at the courthouse as soon as possible.

THE COURT: I'm not sure what equipment they have for treatment or diagnosis of heart matters at the Metropolitan Correctional Center. Maybe you can find out from the warden's office.

THE LAW CLERK: Yes, your Honor, I'll find out.

THE COURT: Are you set up now to play the tapes?

MR. CUNNINGHAM: No, your Honor, we're not. We're not prepared, your Honor. The witness who would be introducing the tapes, the man who sat on the actual tape, is an Officer Waddell. He's on plainclothes assignment. He's scheduled to be here tomorrow at two o'clock.

THE COURT: You had a different officer last time.

MR. CUNNINGHAM: We had twenty-five or thirty different officers assigned to this. Officer Paulson was one of the officers in the overall supervision as well as the District Attorney who is present in the court was the one that obtained the wiretaps and things of that nature. That would be permissible. We could start with the tapes.

THE COURT: Let's see what he's going to testify to. Then I'll hear Mr. Rosner as to if there's enough foundation. I don't think I can make him waive a foundation.

It's enough for him to say he'll accept copies.

MR. ROSNER: Could I make one suggestion, specifically, in terms of the proffered testimony for foundation. It is, if you will, an extension of objections I raised this morning, and I would prefer to do it, have the Court know it in advance.

THE COURT: Yes?

MR. ROSNER. As the Court is aware from what Mr. Cunningham has said, there are State indictments, I assume, growing in part out of the tape the Government intends to offer here. I see no reason why, when apparently these two witnesses get on the stand, they have to identify the nature of their employment. It seems to me it would be sufficient for them to say in one instance he's an attorney, without saying he's either an Assistant District Attorney or former Assistant District Attorney. The implication will be there's a state prosecution.

May I assume what you want him to testify to is voice identification?

MR. CUNNINGHAM: Part will be voice identification. The other portion of it will be authenticating these tapes that Mr. Freundlich is the gentleman that obtained these tapes, obtained the warrants on the tapes.

MR. ROSNER: It seems to me, based on motions to suppress, all the warrants and the chain of events leading to the tape that you intend to offer is already before the court.

All of the supporting documentation and the chain of orders is already before the court. All you're going to do is not only clutter the record--

THE COURT: You have to establish to the jury the tapes were legally made. They were done pursuant to court orders, which I have ruled on.

MR. CUNNINGHAM: I see no problem.

THE COURT: What's Mr. Freundlich going to testify?

MR. CUNNINGHAM: Voice identification.

THE COURT: What's he going to say about having heard the voice? Is that going to involve state crimes?

MR.CUNNINGHAM: Yes.

THE COURT: How did he hear the voice? Maybe he can come forward.

MR. ROSNER: I might, at the risk of

educating Mr. Cunningham--

THE COURT: He's pretty well educated.

MR. ROSNER: Three or four simple questions without getting into the question of state crimes can accomplish what apparently he wants to accomplish.

MR. FREUNDLICH: I heard the voice by having personal conversations with Mr. Alfano and also heard him speak on the telephone about a thousand occasions. Of course, that involves state crime, the telephone conversations.

THE COURT: You don't have to describe the telephone conversation. You did in fact monitor some of the conversations personally?

MR. FREUNDLICH: Not monitor. I have listened to each and every tape and each and every conversation.

THE COURT: You listened to the tape, not the conversation?

MR. FREUNDLICH: Not as it came over.

THE COURT: How many times did you hear, talk to him personally?

MR. FREUNDLICH: Twice.

THE COURT: For how long?

MR. FREUNDLICH: One for about an hour and a half; once for about a half hour.

THE COURT: It's up to Mr. Rosner I think how far he wants to explore that. I think probably it's just as well Mr. Cunningham doesn't go into the fact that you are a law enforcement officer.

MR. CUNNINGHAM: For the sake of protecting the record, would the defense counsel want to stipulate that the voice on the tape is that of Mr. Alfano?

MR. ROSNER: Not having heard the tape myself, and only having read the transcript, it's difficult for me to do that.

THE COURT: The tape was available for you to listen to. You don't have to stipulate.

I think we'd better go ahead with the testimony.

MR. CUNNINGHAM: That's my problem. The testimony we're going to have this afternoon is going to be very, very brief.

THE COURT: I can't help that. Let's make what use we can of the time.

MR. CUNNINGHAM: Very well.

MR. ROSNER: Can I make two other observations and one request on the record. The observations are, as I indicated to the Court, that in my judgment both the tape that the Government intends to offer now and the grand jury testimony, or at least certain portions of it, directly or inferentially indicate possible other crimes that are within state jurisdiction, and to the extent that they do so, I would obiously object to the admissibility of those items.

THE COURT: I haven't read the transcript of the tape (indicating). I don't see much about state crimes in there.

MR. ROSNER: I think there is some indication, at least from my reading of the transcript, an inference -- how can I put it, most gently -- they might infer from the parties to the conversation are involved in loan transactions directly or indirectly.

THE COURT: I would doubt that it would convey that impression to the jury unless somebody emphasizes it in references to cash for a ticket, I thought.

MR. ROSNER: In addition, I requested of Mr. Cunningham during the luncheon recess the grand jury testimony of a Michael -- I don't know how to spell it, Argondizzo.

Apparently that's unavailable.

THE COURT: Is that something that needs a federal court order?

MR. CUNNINGHAM: I have gone through all the records that I have on this case. I was not able to find Mr. Argondizzo's testimony. I personally never read it or kept it. I have duplicate copies of it, grand jury testimony of the records.

THE COURT: If you find it, turn it over.

MR. CUNNINGHAM: Very well. I would like to say during the luncheon break Mr. Rosner and myself went over the grand jury testimony and it came to a compromise as to what was being admitted with one objection which I would request the Court to rule on.

MR. ROSNER: If I might, I might amend Mr. Cunningham's characterization. Compromise to my request, if those portions Mr. Cunningham wants to offer are received, I would ask three other portions to go in at the same time.

MR. CUNNINGHAM: I have no objection except to one, turning to page 6--

THE COURT: I don't have it. Now I have it.

MR. CUNNINGHAM: On page 5, entire page 5

A 226

will go in.

Question, line 22, "Question: And you came back on what airline?

"Answer: National.

"Question: National?

"Answer: Yes."

The disputed portion now is on the top of page 6.

"Question: You didn't want to mess around with the broken planes?

"Answer: (Laughter)"

THE COURT: I don't know what it proves, but if Mr. Rosner thinks it's relevant, why shouldn't it go in?

MR. CUNNINGHAM: I have no objection.

THE COURT: Let it go in.

Is that the only issue?

MR. ROSNER: Two other portions Mr. Cunningham agreed if the Court was going to receive the part he was offering--

THE COURT: I have looked at it and I'm going to receive what he offered and you can put in additional parts.

MR. ROSNER: Thank you, your Honor.

MR. CUNNINGHAM: One other point now.

Again for the purpose of preserving the record in the case: When motions were made originally, to have the tapes suppressed, I believe the Court has made some findings that these tapes are proper and there has not been any violation of law.

THE COURT: I said they were lawful back to the first one -- the one before, on which Mr. Alfano was first recorded. That was as far back as I thought I had to go.

MR. ROSNER: Perhaps, your Honor, I can clarify that. Based on the report that I have of a hearing before your Honor on May 9th, 1975, it says 12 m. but it should be 12 n. as in Nancy, because we didn't sit here at midnight. It was about noon. On page 38, your Honor, in response to my application, starting at line 4, your Honor said "He has a standing to challenge any orders before the ones in effect."

I think that was the burden of your Honor's disposition of my motion on behalf of the defendant Alfano, and in context of all the others.

THE COURT: I said, on page 34, "We have affidavits that were presented to a neutral magistrate and that he found sufficient, and you have to show me some reason to disbelieve them before you can have an evidentiary hearing."

MR. ROSNER: Your Honor was addressing that with respect to the motion of a defendant who had been indicted for perjury.

THE COURT: Mr. Zenkeridge and Mr. Alfano and counsel were all here at the time. The situation then was that I had been over all the Kings County orders and the Suffolk County orders that had just been received that morning. The first reference to Mr. Alfano was in connection--

MR. ROSNER: Mr. Justice Marticello's order--

THE COURT: June 13, '73 order; Order No. 10, and the first Kings County order had been No. 4 in January, 1973. What I held was that the Kings County and Queens County orders seemed to be satisfactory on the face of the applications and orders and that I did not think there was any requirement for me to examine the Suffolk County orders which were made at a time when Mr. Alfano was not involved. That's my ruling then.

MR. CUNNINGHAM: Will you also take into consideration the fact Judge Weinstein had previously ruled on the Suffolk County wires and found them to be satisfactory.

THE COURT: I may have considered that, but I have not examined them. I had not examined them myself. I haven't examined them in connection with today because I thought it was not necessary.

MR. ROSNER: I would only suggest your Honor Judge Weinstein's ruling neither controls your Honor as I'm sure your Honor knows, nor does it necessarily--

THE COURT: That's why I'm limiting my statement. I'm basing it on the Kings and Queens order.

MR. CUNNINGHAM: One other factor. Yesterday afternoon, Assistant District Attorney Hammerman gave me a folder of documents containing additional tape recordings, line sheets on the tape recordings. They are being photocopied now. I've given defense counsel half of the ones already. The half I have given him I have no intention of utilizing. I expect to have the other half of them pretty soon. At this time I don't know if I'm using them. I do want to put on the record I'm turning them over to defense counsel.

MR. ROSNER: I have indeed read certain

transcripts at the luncheon recess, your Honor, in advance of any expression by Mr. Cunningham with respect to his intention to offer them.

I would specifically point out to the Court that in response to the application of particulars of discovery, my letter dated April 27, 1975, the Government specified that it was furnishing a copy of a transcript of August 7, 1973 between the defendant Alfano and Vinny, last name unknown, and further, and I quote from numbered paragraph 3, with respect to discovery on page 4 of letter of April 22: "In the event the Government intends to introduce at trial recordings of the defendant other than those previously supplied, the Government would provide counsel with immediate notification and transcripts thereof."

In addition at the hearing before your Honor on May 9th, 1975, at page 42 and 43 the following appears, starting on line 20:

"MR. ROSNER: For the record, if I can get back to the taps, your Honor, I did receive from Mr. Cunningham eight sheets labeled 'Plant No. 2 PMD, Reel 5, 287/7/3, 8/73. That's legible.

"I assume that's the only tap or recording Mr. Cunningham intends to introduce."

Line 1: "MR. CUNNINGHAM: That's right."

I would specifically submit, your Honor, that coming in in the middle of trial with additional taps or tapes or recordings is wholly inappropriate.

THE COURT: Mr. Cunningham hasn't stated yet that he intends to use any. If you do, you had better give Mr. Rosner an immediate transcript and I'll hear argument as to whether I'll receive it.

MR. CUNNINGHAM: Fine, your Honor.

THE COURT: Are we ready now?

MR. CUNNINGHAM: Yes. There's no full-time doctor at the Metropolitan Center who can be responsible for somebody with a cardiac condition. It would be necessary to take someone to the prison ward at Bellevue.

Will you suggest that we have the patient moved to Bellevue?

THE COURT: I don't know where he is at the present time.

MR. ROSNER: Might I make a suggestion, your Honor. In the interest of expedition, perhaps your Honor could accept an application from the Government to appoint a physician to examine him where he is now.

THE COURT: Where is he?

MR. CUNNINGHAM: At his home, your Honor. Considering the nature of the malady, I don't think a physician can examine a man outside of a hospital.

MR. ROSNER: When-- I hate to go back to ancient history, but when I was in the United States Attorney's office, we had a Dr. Gold who was a preeminent cardiologist in the city examine a man who was a lawyer in the lawyer's residence to certify whether the lawyer had or not suffered from a cardiac condition.

MR. CUNNINGHAM: The problem, they're not claiming the man has had a heart attack. They're saying that he is in the possibility of having a heart attack, which is a little different.

MR. ROSNER: I guess so.

MR. CUNNINGHAM: Which seems to be the malady that's being complained.

THE COURT: I'll make inquiries.

Is your witness ready?

MR. CUNNINGHAM: Yes. Unfortunately, I believe this will be our only witness this afternoon.

THE COURT: You're not going to use Mr. Freundlich?

MR. CUNNINGHAM: He will identify the tape recordings saying he had heard the tape recording and the voices are as claimed.

THE COURT: Bring the jury in.

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, every case is different from any other. This one has some built-in delays that I apologize for, but we're ready to proceed to some extent now.

Mr. Cunningham, call your next witness.

HOWARD BROWN, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q By whom are you employed?

A Eastern Airlines.

Q In what capacity?

A Superintendent of investigations.

Q How long have you been so employed there?

A Twelve years.

Q Now, sir, are you familiar with the process known as blacklisting of stolen or missing airline tickets?

A I am.

Q Do you have a copy of a blacklist with you now?

A I do.

Q May I see it, please.

A (A document is handed to Mr. Cunningham.)

MR. CUNNINGHAM: Might I have this marked for identification, please.

THE COURT: Yes.

THE CLERK: One-page document marked Government Exhibit 17 for identification.

(So marked)

(Said document handed to Mr. Rosner.)

Q Can you tell what this document is?

A This is a bulletin put out by the Air Transport Association of America known as A.T.A. It's sent to all revenue accounting agencies committees, audit committees and security committees from the Director of the Office of Enforcement. Then it lists all agencies--

MR. ROSNER: Objection. Not in evidence.

THE COURT: He's not giving us the numbers. I think I'll let him describe what the practice is with respect to it.

A (Continuing) It's a list of tickets that are lost in transit and they go by number and these numbers are then listed and they're blacklisted with the various carriers.

Q Could you tell us what blacklist-- what agencies that blacklist is for?

A . Bayonne Travel, 819 Broadway, Bayonne, New Jersey.

MR. CUNNINGHAM: I would ask this be received in evidence.

MR. ROSNER: I don't think there's a proper foundation yet, your Honor.

THE COURT: Let me look at it.

(Said document is handed to the Court.)

(Side bar)

THE COURT: First, there are earlier bulletins, it refers to earlier bulletins. Do you know anything about this?

MR. CUNNINGHAM: Yes, your Honor, this all refers back to the seven shipments of tickets that were stolen in the New York Metropolitan area, stolen during the three-month period of time. This blacklist just represents 900 of the

7,000 tickets that were stolen from the seven different shippers. If the Court would like me to redact it--

THE COURT: Mr. Rosner has a question about foundation. I'm not sure what more you think should be--

MR. ROSNER: I don't think mere identification is enough to have it admitted. I don't think there's sufficient foundation.

No. 2, there's indication here of other potential massive crimes not charged in the indictment.

THE COURT: I think--

MR. ROSNER: It's not binding upon my client.

THE COURT: It bears when they were notified. If you were to block out these two (indicating), Mr. Rosner's other objection would then be covered. If you want--

MR. CUNNINGHAM: I'll be able to redact that.

MR. ROSNER: My question is are there notices earlier relating to the tickets that are charged in this indictment?

MR. CUNNINGHAM: I can get all of these notices if the Court wants it on Monday without difficulty.

MR. ROSNER: I'm asking--

THE COURT: I believe Mr. Rosner would like to see them. I'll receive them with the deletions as indicated. Make a copy of it.

THE CLERK: Government Exhibit 17 marked in evidence.

(So marked)

THE COURT: I'll receive it in evidence as to what I specified at the side bar.

MR. CUNNINGHAM: Would you direct the witness not to pay any attention to these two paragraphs.

THE COURT: Yes.

Q Other than those two paragraphs on the document, could you tell us what that is, sir?

A A list of tickets from the Air Traffic Conference that were lost in transit, totals 900 tickets.

Q Now, sir, can you tell us what the practice is of the ticket agents at the receiving gates of the airport when they are receiving tickets on the New York to Florida run?

BEST COPY AVAILABLE

A We would like the ideal thing of each agent to check each ticket. It's almost an impossibility with the number of people on lines waiting to board an aircraft; therefore, the tickets are not checked against--

Q Is that the practice--

A The blacklist.

Q Is that the practice of National Airlines?

A Pardon?

Q Is that the practice of National Airlines?

A Yes, to the best of my knowledge.

Q The same with Eastern Airlines?

A Yes.

MR. ROSNER: Objected to, your Honor.

THE COURT: Overruled.

MR. CUNNINGHAM: I have no further questions of the witness.

CROSS EXAMINATION

BY MR. ROSNER:

Q Mr. Brunn, the last paragraph of Government Exhibit 17 says, and I quote:

"It is requested that the above listed tickets not be honored if presented for usage, reissue or refund, and any instances noted be referred to this office."

You're familiar with that?

A Yes, I am.

Q You just testified that it's not the practice of Eastern personnel at the airport, at least on the New York to Florida run to check tickets presented for usage against the so-called blacklist bulletin, right?

A I wouldn't say it's not the practice. We would love the practice to be carried out. The possibility is very slim. There are many tickets that are checked that are suspicious. They are stopped along the route.

Q In other words, there are occasions when the agents at the airport do check them?

A On occasons when they are suspicious of the individual, but they can't check every one of them.

Q Do you know how they choose to check them -- you don't know?

A Yes, I do.

Q You do?

A I can tell you.

Q They look at somebody and say--

A We have given instructions-- I have run training classes. A lot of tickets are suspicious. No. 1, a travel agency ticket is suspicious if it's validated in

California with a travel agency in California and they are traveling Miami to New York or New York to Miami.

If a ticket is open both ways, that is another occasion there might be something wrong with the travel agency ticket. They are definitely checked.

Q Pursuant to your instructions?

A That's right.

Q But the general instructions are to check every ticket against the blacklist?

A Yes, but it's almost impossible.

Q How about if a ticket is presented instead of for passenger as such, in other words, when you check in, "I'm going to Florida, here's my ticket," how about if you present it for I think the word used here is reissue. You want to change either from one flight to another or one airline to another, is it checked then?

A It all depends where it's reissued.

Q Let's assume it's reissued in New York, New York to Florida run.

A That's a good possibility it can be checked.

Q There's a good possibility?

A Yes.

Q So that if somebody had an Eastern ticket and they went to National, to have National reissue the ticket to them to go on a National flight instead of an Eastern Flight, there would be a good possibility it would be checked?

A I can't speak for National in that circumstance.

Q I thought you had just testified based on your experience they don't check tickets presented for usage.

A At the airport.

Q How about tickets presented for reissue?

A At the airport or at the city ticket office?

Q Either.

A At the airport, chances are they won't -- there will be no check made. It will be impossible because of long lines of people they have there.

Q How about at the city locations?

A The city ticket office is not busy at the time it's a good possibility it could be checked.

Q How about at the airport, if the checking counter is not busy at the time?

A It's very seldom it's not busy.

Q How about refunds at the airport?

A No ticket is refunded at the airport. It's sent to Miami for refund.

Q It's submitted at the airport?

A Submitted there but then forwarded to Miami.

Q I'm showing you Exhibits 1, 2, 3, 4, and 5. With your twelve years experience, were you a ticket agent?

A [illegible]

Q Were your twelve years of experience -- had you been a ticket agent at the time these were presented for usage for passage, would you have checked them against the blacklist to see if they were part of a lost lot?

A Exhibit No. 1, flight 743. This is Coupon No. 2. This is the return flight. I wouldn't have checked this one. I would have assumed probably Coupon No. 1 was already checked because this is Coupon No. 2, the return flight.

The same with Exhibit No. 2.

Q Can I just ask you a question in that regard, sir.

You just said you would have assumed that Coupon No. 1 would have been checked, correct?

A I would assume it at that time, yes.

Q Checked when it was presented for usage from New York to Florida?

A That's right.

Q Haven't you just testified--

A You said as an agent. I assumed as an agent.

Q But as an agent you would also assume that you weren't checking every ticket, wouldn't you?

A Not every one, no, I would assume that, yes.

Q So how do you assume Ticket No. 1 would be checked if you just testified that agents in the normal course don't because it's impossible to do it.

A Coupon No. 2, I would never check Coupon No. 2 if I was an agent.

Q Assume that what you have in front of you is Exhibit 1 and 2 or Coupon No. 1. Will you check it?

A No.

Q You wouldn't?

A (No response.)

Q It looks like a perfectly valid ticket?

A Yes.

Q How about Nos. 3, 4, and 5?

A They all look valid to me.

Q Nothing suspicious insofar as you're concerned?

A No.

MR. ROSNER: No further questions, your Honor.

THE COURT: Any redirect?

MR. CUNNINGHAM: No.

THE COURT: You're excused.

Thank you, Mr. Brunn.

(Witness excused)

THE COURT: Do you want to ask him about those other documents?

MR. CUNNINTHAM: Pardon me?

THE COURT: Before Mr. Brunn goes.

MR. CUNNINGHAM: No, your Honor.

THE COURT: Very well.

MR. CUNNINGHAM: Could we have a side bar?

THE COURT: Yes.

(Side bar.)

MR. CUNNINGHAM: My next witness will be Mr. Freundlich. That will be my final witness for the day.

THE COURT: All right, it's a fouled up day, but it's partly because witnesses didn't show up.

I had my law clerk talk with Samaratin Hospital which I know; the information I got there is that neither of their cardiologists would think of examining at home, which is adequate. If he can be brought to the hospital, they would not have to keep him overnight, probably let him go. Dr. Pelech, whom I know, who is the resident physician, he might be able to tell you what the situation is.

MR. CUNNINGHAM: That will be fine.

Perhaps we can get him there the first thing in the morning.

MR. ROSNER: I don't represent any of them. I don't want to have anything to do with it.

THE COURT: All right.

He can talk with his own laywer.

MR. CUNNINGHAM: He's going to need one.

(In open court.)

MR. CUNNINGHAM: Could we have a side bar?

THE COURT: Yes.

(Side bar)

MR. CUNNINGHAM: In order for Mr. Freundlich to identify this tape recording as being that of the defendant, he's going to have to hear the tape. Rather than prejudice the trial in that event, we'll have a problem if the tape is played in front of the jury and found inadmissible.

THE COURT: We can play it in the absence of the jury.

MR. ROSNER: Might I make an observation.

THE COURT: Yes.

MR. ROSNER: I assume he's heard it already.

MR. CUNNINGHAM: Yes.

MR. ROSNER: I assume he's made a mark on the reel or container.

MR. CUNNINGHAM: No.

MR. ROSNER: He never has.

You gentlemen don't do things the way we used to do them.

THE COURT: They have to be shown at the state court.

MR. CUNNINGHAM: These are 24-hour tapes going three and a half months.

MR. ROSNER: He's said he listened to all of them. I assume he has made a notation.

THE COURT: Do you have a mark so you can tell just where to start?

MR. CUNNINGHAM: We can go right into it.

THE COURT: I'll explain to the jury we'll have to take an interruption.

MR. CUNNINGHAM: Fine.

(In open court.)

THE COURT: I think we'll have to take an interruption now, have you back in about fifteen minutes, probably. Go back to the juryroom, please, and still do not talk about the case.

(The jury leaves the courtroom.)

MR. CUNNINGHAM: Let the record indicate I'm turning over to counsel now the tapes of 7/20/73, Plant No. 3, Reel No. 34, Stephen Maltese to Larry Alfano;

Tape of 7/2/73, Plant No. 3, Reel No. 16, the tape recording of Stevie to Larry;

6/29/73, Plant No. 3, Reel No. 39, Stevie to Larry;

6/27/73, Reel No. 13, Plant No. 2, Stevie Maltese to Larry Alfano;

June 26, 1973, Plant No. 3, Reel No. 11, Steve to Larry;

Plant No. 3, June 20, 1973, Reel No. 5, Steve Maltese to Larry Alfano;

June 19, 1973, Plant No. 3, Reel No. 4, Steve, for Larry;

June 15, 1973, Plant No. 3, Reel No. 1, Danny for Larry;

June 15, 1973, Plant No. 2, Reel No. 1, Lee to Mike Argondizzo to Larry Alfano.

MR. ROSNER: Might I inquire, your Honor, whether these are being produced under Brady, under 3500, or in anticipation of the Government offering the tapes of which these are transcripts?

MR. CUNNINGHAM: The Government, in answering those questions in order, takes the position it certainly is not Brady material. There's nothing exculpatory in there to the defendant.

As to 3500 material, it's not being turned over in that regard, as defense counsel has had more to -- welcome to the defendant Alfano -- but possibly being offered in evidence against the defendant.

THE COURT: I'll have to get a little background as to why you bring them up so late.

MR. CUNNINGHAM: Getting them up so late, Mike Hammerman was over here yesterday, the Court noted, and he gave me documents yesterday. Among them were these. He also gave me some additional documents today.

THE COURT: That's not an answer. He's been around and you've been around since last May.

MR. CUNNINGHAM: That's more than correct, your Honor.

THE COURT: It's kind of late.

MR. CUNNINGHAM: There are line sheets for every telephone conversation at the Crossroads Bar, at Nester Social Club, at every one of these taps. I just did not know these conversations existed.

THE COURT: When did you get the line sheets?

MR. CUNNINGHAM: I never had the line sheets.

THE COURT: Oh.

MR. ROSNER: They have obviously been available since the Government did get those already given to me back in April.

THE COURT: This case has been around since January.

MR. CUNNINGHAM: Yes.

THE COURT: You could have had them earlier.

MR. ROSNER: I assume they had them for the other defendants in other indictments that are related.

MR. CUNNINGHAM: No, your Honor. What we had on this thing here, we had certain tape recordings were played to the grand jury. The grand jury tape recordings were played on the basis of this indictment, was the tape recording turned over to defense counsel. The line sheets on these cases, I might be using the wrong terminology -- the line sheets simply state the date of the telephone call and the party who is talking to the other party. In other words, Steve to Johnnie.

There's no way we would know that that was involving airline tickets.

MR. ROSNER: They sure find out quickly enough the one they give me back in April had to do with airline tickets. They could have found out at least in April they did.

THE COURT: You're not offering these this afternoon?

MR. CUNNINGHAM: No.

THE COURT: You're playing the one for Mr. Freundlich?

MR. CUNNINGHAM: Yes.

THE COURT: I'll consider what the rule should be on a delayed proffer like this. Of course, we're not using them until Monday. It's not an extreme surprise, Mr. Rosner.

MR. ROSNER: It is insofar as I indicated to the Court and Mr. Cunningham, the only one that we had was a tape subsequent to the charges contained in the indictment and now we have tapes starting June 15th, two of them on June 15th, June 19th, June 20th, June 26th, June 27th, June 29th, July 2nd, July 20th, which straddle a period before and after the crimes charged in the indictment and obviously changes the entire theory of the defense in the middle of the trial.

THE COURT: I'm not quite sure of that. I'll consider it.

MR. ROSNER: If Mr. Freundlich's testimony turns out to be what I anticipate it will be, based on the brief hearing of the tape, it may not be necessary to keep him around to testify before the jury.

THE COURT: We'll see.

DAVID FREUNDLICH, called as a witness and being duly sworn out of the presence of the jury, testified as follows:

THE COURT: Let him listen to the tape.

MR. ROSNER: Might I suggest the tape be marked Exhibit 18.

THE COURT: Stop the tape, please.

What was the question?

MR. ROSNER: Might I suggest as long as Mr. Freundlich is going to identify the voice on the tape, the tape should be marked as Exhibit 18 so that references could be made to it.

I saw a whole bunch of tapes there.

THE COURT: All right.

THE CLERK: Tape, Government's Exhibit 18 for identification.

(So marked)

THE COURT: The recording we're about to hear, a tape recording--

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q August 7, 1973, Mr. Freundlich, between Larry, June and Vinnie.

A Yes.

THE COURT: You can step down if you can hear it better.

THE WITNESS: Thank you.

(Witness leaves the stand to approach tape which is now being played in the courtroom, outside the presence of the jury.)

(Tape is stopped.)

THE COURT: It sounded very fast and not very clear.

(Tape again continues to be played in the courtroom.)

(Tape finished playing in courtroom.)

(Witness resumes the stand.)

THE COURT: Guess you ought to have the transcript marked, too, so you'll have something to identify by the witness.

MR. CUNNINGHAM: Yes, your Honor.

THE WITNESS: On the outlet you used this time it came through audibly except the parts marked inaudible.

MR. CUNNINGHAM: There might be something wrong with the machine, your Honor.

THE CLERK: Transcript marked Government's 19 for identification.

(So marked)

THE COURT: Mr. Rosner said something about perhaps not needing the witness to testify to the jury, but if he's going to identify voices, unless you concede that it's the voice --

MR. ROSNER: Could I suggest Mr. Cunningham ask Mr. Freundlich the questions that he wants to ask him outside the presence of the jury?

THE COURT: Go ahead.

BY MR. CUNNINGHAM:

Q Mr. Freundlich, do you recognize the voice on the tape recorder you just heard?

A Which voice?

The male voice.

A There were two males.

Q The male carrying on the predominant portion of the conversation referred to as Larry.

A I do.

Q Can you tell us what you recognize that voice to be?

A That is the voice of Larry Alfano.

Q The defendant in this case?

A That's correct.

THE COURT: You have to have a little foundation.

MR. CUNNINGHAM: I'm sorry.

THE COURT: If you had a jury here I would require a foundation.

MR. CUNNINGHAM: I'd be happy to.

Q By whom are you employed?

A Suffolk County District Attorney's office.

Q Prior to employment in the Suffolk County District Attorney's office, who were you employed by?

A Brooklyn District Attorney, Kings County.

Q What was your position in the District Attorney's office in Kings County?

A Assistant District attorney with the Rackets Bureau, Organized Crime section.

Q Did you have occasion in your official capacity to obtain documents for the installation of a wire tap on a bar known as the Crossroads Bar on Metropolitan Avenue in Queens?

A I did.

Q In the course of your duty did you have occasion to listen to the recordings played on the wire tap?

A I did.

Q Did you listen to this wire tap you just heard previously?

A This recording?

Q Yes.

A I did.

Q Did you ever have occasion to speak to the defendant Lawrence Alfano?

A I have.

Q Can you tell us when and where?

A I spoke to him on three occasions in person. I spoke to him in June of 1974, in Kings County in the -- outside the grand jury in Kings County and inside the grand jury in Kings County.

Q Approximately how long?

A The whole time there was approximately an hour.

Q The second occasion?

A I spoke to him again in November of 1974 when Mr. Alfano was arrested on a state indictment, seven indictments, I believe, where also at that time I had a conversation with him and his voice was recorded in that conversation. That was how his pedigree was taken when he was arrested, and I spoke to him again yesterday outside this courtroom when Mr. Alfano asked me several questions about what I was doing now.

Q The voice you heard on the tape recording, can you identify that to be the voice of defendant Alfano?

A The voice on that tape recording who answers to the name of Larry is Mr. Alfano. The other voice is someone else.

CROSS EXAMINATION

BY MR. ROSNER:

Q How long were these conversations you've had with Mr. Alfano previously and in total?

A The grand jury conversation taken place must have been an hour, or in that area. The conversation when he was arrested took place ten minutes, but five minutes later I would go back and speak to him.

The conversation outside yesterday was about three minutes, if that long, and there was also he called me on the phone I believe one time to ask me when he had to appear in the grand jury. That wasn't in person, that was a phone conversation.

Q There were two other voices on that tape.

A Two and a male in the background, three altogether, a male in the background who Larry was talking to, Vinnie directly, and June on the tape, I believe.

Q Do you have the capacity, of your own knowledge, based on your experience, to identify the other voices?

A Yes, I do.

Q In other words, have you spoken to those other persons as well?

A I have.

Q Can you tell the Court who they are?

A Vinnie I believe is Vinnie Cardocci, the owner of Mr. Lucky's Bar, and June is someone I just met recently. I'm not sure of her name, and I spoke to her for seconds. I know that through investigation, not through speaking to her. I couldn't recognize her voice.

Q You could not?

A I could not.

MR. ROSNER: I have no further questions, your Honor.

I will stipulate Mr. Freundlich can be excused and the jury can be informed that the voice on the tape recording has been identified as the voice of Mr. Alfano, the voice having to do with the response to Larry.

THE COURT: Is that satisfactory, Mr. Cunningham?

MR. CUNNINGHAM: Yes, your Honor.

THE COURT: Thank you very much, Mr. Freundlich.

THE WITNESS: Thank you.

(Witness excused)

MR. ROSNER: Obviously, I don't want to waive the other objections I have made that had not anything to do with voice identification.

THE COURT: No, but you can't now argue to the jury there is a dispute about the voice.

MR. ROSNER: I don't intend to.

THE COURT: You don't really have a complete foundation for the tape yet.

MR. CUNNINGHAM: No.

THE COURT: You can't play that now.

Is there anything for the jury at the present time?

MR. CUNNINGHAM: No.

THE COURT: I will excuse them until two tomorrow.

THE LAW CLERK: Shall I bring them in?

THE COURT: Yes.

(The jury enters the jury box.)

THE COURT: Mr. Foreman, ladies and gentlemen, we have made some progress on identifying some evidence that will come in later on, but the Government is not prepared with anything else at this time.

We're going to adjourn until two tomorrow. I'm sorry we used so little of your time productively today, but it's all making progress on the case.

Tomorrow you should check in at the Central Jury Room downstairs before two. You don't have to come in in the morning. You're due here at two o'clock.

The rules apply. You don't talk about the case amongst yourselves or at home or with anybody else while you're out of the courtroom, and you don't talk at all, please, to any of the people who are now in the courtroom. Thank you.

(The jury leaves the courtroom.)

THE COURT: Now, Mr. Cunningham, Mr. Rosner has no responsibility for getting Mr. Maltese to the hospital tomorrow morning.

MR. CUNNINGHAM: No.

MR. ROSNER: I don't even know him.

THE COURT: He was in the courtroom the other day.

MR. CUNNINGHAM: That was Mr. Sampogne. That's the gentleman in the card game.

MR. ROSNER: That's the only one I met, your Honor.

THE COURT: If you think you can get him by ambulance to 759 President Street, Samaritan Hospital, I'll call beforehand to make sure the doctors are available to see him.

MR. CUNNINGHAM: I will advise the doctor over there to bring him over to Samaritan Hospital tomorrow for a workup, have him speak to the doctors.

THE COURT: Thank you. Any idea what time? I suppose not.

MR. CUNNINGHAM: No.

THE COURT: Let my law clerk know when you find out.

(Time noted: 3:45 p.m.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

LAWRENCE ALFANO, : 75-CR-298
74-CR-318

Defendant. :

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United States Courthouse
Brooklyn, New York

October 17, 1975
2:00 o'clock P.M.

Before:

HONORABLE ORRIN G. JUDD, U.S.D.J.

RAYMOND STALKER
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
Uniged States Attorney
for the Eastern District of New York

BY: MYLES CUNNINGHAM, ESQ.
Assistant U.S. Attorney

JONATHAN ROSNER, ESQ.
Attorney for Defendant

Also present:

MS. MARION SELTZER, ESQ.
Legal Aid Society
For Witness Michael Argondizzo

THE CLERK: Case on trial.

THE COURT: Mr. Cunningham, have you some witnesses. I heard from the hospital that one of them didn't show up.

MR. CUNNINGHAM: Yes, your Honor. I received a telephone call this morning from Doctor Mangiaracina who is the private physician of Mr. Maltese. He advised me that he had met with the --

THE COURT: My question is do you have any witnesses?

MR. CUNNINGHAM: Yes, your Honor. We have one witness and the tape recording and we'll put the grand jury minutes in.

THE COURT: I will hear what is on the civil case, then we will bring the jury in.

MR. CUNNINGHAM: Fine, your Honor.

(Short recess.)

THE COURT: Now I willhear you.

MR. CUNNINGHAM: Your Honor, first of all I would like the record to indicate yesterday a request was made of the Government for the minutes, the grand jury minutes of Michael A. Argondizzo for February 21st.

MR. ROSNER: You supplied me with Argondizzo.

MR. CUNNINGHAM: For February 21, 1974.

I will turn a copy over to defense counsel.

I've also checked with Frank Sheerin who was the assistant formerly in charge of this case. He advised me to the best of his recollection there were no further grand jury testimony of Argondizzo.

THE COURT: You said it was turned over?

MR. CUNNINGHAM: Besides what's been turned over.

MR. ROSNER: I have in fact, your Honor, received what is labeled the grand jury minutes of Michael Argondizzo, dated February 21, 1974, starting at page 2 and ending on page 55.

I would like with the Court's permission to hand up a letter to the Court for the Court's information and I'm giving Mr. Cunningham a copy. I would like to be heard at the Court's convenience with respect to the Government's anticipated proffer of 9 or 10 other items that were produced which we received transcripts yesterday afternoon. I would also like to be heard with respect to the proposed testimony of the witness's grand jury testimony. I received I think on Wednesday morning. Which would be Mr. Kilgallan and Mr. Sampogne and what is the name of the other guy?

MR. CUNNINGHAM: Maltese.

MR. ROSNER: Maltese.

THE COURT: Well, I'm sorry you feel the way you do in that letter. It really seems to me you were trying to make the jury think something that was not true. The people at the airport had a chance to check the tickets against the black list.

I do not think a lawyer has an obligation to persuade a jury of facts that are not so.

MR. ROSNER: Your Honor, I respectfully resent your Honor's remark insofar as I am seeking to present testimony before this jury that is a fair implication. I ask your Honor to grant a mistrial and recuse himself.

THE COURT: Denied.

As I said Dean Friedman thinks a lawyer should present the truth. What you were doing was try to persuade the jury of facts that are not true and you knew were not so.

MR. ROSNER: That is not so. I object to your Honor's remarks to my letter and I object to the receipt of this in evidence of Government's Exhibit 13 which was the charge plate and I anticipated as indeed happened, testimony concerning another crime, wholly unrelated in respect to this and I don't know what Mr. Friedman's consideration of a defense attorney is, he has a right to put in perjured testimony with what has to do with what happened yesterday and I deeply resent your Honor's position.

THE COURT: I'm sorry. I think there is a difference between criminal trial lawyers and I think it is a lawyer's obligation to show the truth by what the code of ethics require --

MR. ROSNER: Your Honor, I'm fully familiar with the code of ethics and I am on the state bar and I was on the association bar committee on grievances. The Supreme Court itself has recognized that an attorney may during the course of a trial, especially in a criminal trial, to pursue conduct, that isn't the answer and the test and on making, motions to suppress that I did yesterday and it has nothing to do with perjured testimony.

THE COURT: I agree it has nothing to do with perjured testimony. What happens frequently in the early part of the trial is that a lot of attention is given to trivia which has nothing to do with the main part of the case. That's what seems to be taking place with respect to the matter of the timing of the black list.

Are you ready with your witness?

MR. CUNNINGHAM: Yes, your Honor.

THE COURT: Let's proceed.

MR. ROSNER: Can I be heard with respect to the tapes and the transcript?

THE COURT: Yes, all right.

MR. ROSNER: Or is it your Honor's desire not to rule on that at this juncture?

THE COURT: Is that your next witness?

MR. CUNNINGHAM: No, the only tape that is going to come into evidence, the tape previously turned over to counsel.

MR. ROSNER: Well, in that regard I would just respectfully request the Court to redact from the tape and transcript the references to criminal acts not charged in the indictment.

THE COURT: What are they, I didn't see any.

MR. ROSNER: The reference to subsequent criminal acts with respect to airline tickets.

THE COURT: They are part of the same general transaction and the Court, our Court of Appeals has twice said that similar acts are admissible.

MR.ROSNER: On what issue?

THE COURT: The United States against Bond, Fed.2nd, 669. And United States against Ve Oreo in 451, Fed. 2nd, 21 which treated it as so.

MR. ROSNER: I haven't read any of those decisions. My question is whether the issue there was knowledge or intent. I think there is a distinction.

THE COURT: Well, I would suppose it's clearly admissible on knowledge.

MR. ROSNER: I would suggest, your Honor, that it is admissible and perhaps in your discretion on intent, but not on knowledge.

THE COURT: Here it was for willful and intent and motive.

MR. ROSNER: Correct, your Honor. Wigmor is of the same view, but a different view with respect to knowledge which is the issue on trial. I respectfully call the Court's attention to Section 316 through 326 in Wigmor.

MR. CUNNINGHAM: Your Honor, the first Government witness will be Police Officer Wadell, who was the police officer who actually listened to the tape as it was being recorded. Perhaps since Mr. Rosner does not wish to have theidentity of the witnesses brought to the Court's attention as he did yesterday, as we did with Mr. Freudlich from the District Attorney's office, if he wishes to stipulate or if he wishes to examine Mr. Wadell before we put him on the stand and we can put the tapes right --

MR. ROSNER: Would your Honor bear with me for one moment?

THE COURT: Yes.

Let me just put on the record I denied the motion to redact the tape in view of what I said about the law on the subject.

MR. ROSNER: The defense is willing to stipulate that without stating the employment of the witness, that if called, a witness would testify that the tape that is marked, I believe Government's Exhibit 18, is a duplicate original of the tape recording of the telephone conversation made at the Crossroads Bar, I think on August 7, 1973.

THE COURT: All right. Does that cover it?

MR. CUNNINGHAM: That would cover it, I believe, your Honor. I would also ask at this time since we have not come to the question of ruling on the additional tapes which the Government will seek to introduce, we had a similar tape that in effect brings all the police officers here on Monday morning.

Do you have any objection to that --

THE COURT: I haven't ruled on those tapes yet.

MR. CUNNINGHAM: No, your Honor, but assuming a favorable ruling were to be issued, it would necessitate --

MR. ROSNER: I would stipulate a witness without without identifying their employment would testify that the tapes are going to be marked as Government's Exhibits and are duplicates of the originals of the telephone tapes and telephone conversations made at the Crossroads Bar on the date set forth in the transcripts.

MR. CUNNINGHAM: The voice on the tapes is that of the defendant Alfano?

MR. ROSNER: No. I would not stipulate about a witness's testimony on the voice in the tapes, is that of the defendant Alfano. The question as to whether it is or is not is a question for the jury, that they can reject the voice identification.

THE COURT: You'll stipulate to voice identification?

MR. ROSNER: I would stipulate that if Mr. Freundlich would testify the voice on the tape, based on his experience is the voice of the defendant Alfano.

THE COURT: The voice had been identified?

MR. ROSNER: That's correct, your Honor.

THE COURT: But you said it was not proper --

MR. ROSNER: But I say the ultimate question I will not argue to the jury if it was not proper.

The question is, the ultimate question as to whether it is the defendant's voice, it's not for the jury, it's not for the Court and not for me. I mean the Government is getting just as much as if the witness --

THE COURT: I think if an Assistant District Attorney came here and testified that he was familiar with the defendant's voice is quite more than a stipulation that counsel apparently feels he's entered into. I think I would have to ask Mr. Freundlich to come back and testify.

MR. ROSNER: I think the stipulation I entered into yesterday was clear as could be. A witness would testify that the voice was that of the defendant Alfano.

MR. CUNNINGHAM: I think that the tape recording was that of the defendant Alfano.

MR. ROSNER: I don't think that's what the record will reveal, your Honor.

Your Honor, for the purposes of this proceeding and for this proceeding only, we stipulate that the voice on Government's Exhibit 18 responding to the name Larry is the defendant Alfano.

MR. CUNNINGHAM: How about on the subsequent --

MR. ROSNER: I would like to hear those before I make a decision. I can't give you a blank check on that.

THE COURT: That's fair.

MR. CUNNINGHAM: That's fair.

THE COURT: Then we don't need Mr. Wadell?

MR. CUNNINGHAM: Mr. Wadell can be excused.

THE COURT: We can play the tapes next.

MR. CUNNINGHAM: We'll play the tapes and read the transcripts.

MR. ROSNER: I assume it is a single tape?

THE COURT: One tape.

MR. CUNNINGHAM: One tape.

THE COURT: Let the jury come in.

(Jury enters box.)

THE COURT: Ladies and gentlemen, I suppose you are all here on time and I know you have been waiting a long time. I only had 15 minutes for lunch this morning, I was busy on a hearing in chambers until I came into the courtroom. I think you were waiting since then we have eliminated the necessity of hearing one more witness. Mr. Cunningham is now about to play the tape of a telephone conversation.

You may proceed, Mr. Cunningham.

MR. CUNNINGHAM: If the Court pleases I prefer first to read the testimony of the grand jury witness.

THE COURT: You may do that.

MR. CUNNINGHAM: Thank you, your Honor.

THE COURT: The rule on this was that if there was any point at which Mr. Rosner wanted to hear the rest of it, any part of the grand jury testimony that you were going to omit it and he can put it in at that point.

MR. ROSNER: I had understood Mr. Cunningham and I agreed all of it would go in at the same time. He will read it continuously. I believe Mr. Cunningham is aware of those portions.

THE COURT: Read it all.

MR. CUNNINGHAM: Grand jury testimony of Lawrence Alfano before the United States District Court, Eastern District of New York, on February 21, 1974. Presented by Assistant United States Attorney Francis Sheerin and reported by Miss Elizabeth A. Ng.

"Lawrence Alfano, having first been duly sworn, assumed his seat as a witness and testified as follows:

"Examination by Mr. Sheerin:

"Question: Would you state your name for the record, please?

"Answer: Lawrence Alfano.

"Question: What is your occupation?

"Answer: I'm a manager of a bar and restaurant.

"Question: What's the name of that?

"Answer: Cross Roads Lounge.

"Question: And who is the owner of the Cross Roads?

"Answer: Robert Samponge.

"Question: Samponge?

"Answer: S-a-m-p-o-n-g-e.

"Question: Well, just call him Robert, all right?

"Answer: Right.

"Question: Now, do you have any other source of income besides your occupation at Cross Roads Bar?

"Answer: No.

"Question: Now, have you taken any airline trips in the past year yourself?

"Answer: Me myself alone?

"Question: Yes, no. You and either by yourself or with anybody?

"Answer: Me and my family.

"Question: You and your family, where did you go?

"Answer: Florida.

"Question: When did you go?

"Answer: In July of 1973.

"Question: On what airline did you travel?

"Answer: Started out Eastern but I think I would up with another one that I can't remember because the plane had broken down. I think it was Northwest. Northeastern. Something like that.

"Question: Where did you fly to?

"Answer: Fort Lauderdale.

"Question: Where did you stay down there?

"Answer: My mother and father have ahome down there.

"Question: How long did you stay about?

"Answer: Five days, six days.

"Question: And you came back on what airline?

"Answer: National.

"Question: National?

"Answer: Yes.

"Question: You didn't want to mess around with the broken planes?

"Answer: (Laughter)

"Question: Have you ever taken any other trips in the past two years?

"Answer: Yes. Same place.

"Question: Same place?

"Answer: Yes.

"Question: Have you taken any other trips besides the two to Florida?

"Answer: Yes. One in November of this year to Las Vegas.

"Question: Las Vegas?

"Answer: Yes.

"Question: What airline did you travel on?

"Answer: American.

"Question: Now, was that a charter or was that a regular scheduled flight?

"Answer: A charter.

"Question: Who was the charting agent?

"Answer: I really don't remember. I had someone else make the arrangements for me, a friend of mine.

"Question: Who?

"Answer: Friend of mine. Sal Guida.

"Question: G-u-i-d-a?

"Answer: I don't know. I don't know how to spell the name.

"Question: Where could Sal be found?

"Answer: Well, he's a friend of mine. He comes up to my place of business.

"Question: When was the last time you saw him?

"Answer: When I was in Las Vegas with him.

"Question: Which was?

"Answer: November.

"Question: Where did you stay there?

"Answer: At the Thunderbird.

"Question: Was there a junketeer or somebody else that --

"Answer: No. It was just a charter flight whereas you pay a certain amount and you pay thehotel and the flight.

"Question: You didn't receive a complimentary room at thehotel or something like that?

"Answer: Well, the price I paid included the flight and the room.

"Question: What did you pay?

"Answer: For me and my wife, I think it was $157 a person.

"Question: To Las Vegas?

"Answer: Yes.

"Question: That was round trip?

"Answer: Yes.

"Question: Now, how about on the other flights to Florida? Did you receive any discounts?

"Answer: On the July flight, yes.

"Question: That was the last one?

"Answer: Yes.

"Question: And what percentage discount did you receive?

"Answer: I think it came to almost a third.

"Question: Almost a third?

"Answer: A third off, yes.

"Question: And from whom did yo u receive the tickets?

"Answer: Well, I received it from a fellow that I was introduced through another person.

"Question: Who introduced you first?

"Answer: Well, this fellow Mike.

"Question: Mike who?

"Answer: Aderdizzo (phonetic).

"Question: Mike Aderdizzo, something like that?

"Answer: It's very hard to pronounce.

"Question: When was the last time that you saw him?

"Answer: Outside.

"Question: How about Argondizzo?

"Answer: I'd say Aderdizzo.

"Question: He shortly left the outside hallway you were sitting in?

"Answer: Yes.

"Question: And he introducedyou to somebody?

"Answer: Yes.

"Question: Who did he introduce you to?

"Answer: This fellow's name was Charlie.

"Question: His name was Charlie?

"Answer: Yes.

"Question: And when was that?

"Answer: That was in May of 1973.

"Question: And how many times did you see Charlie?

"Answer: Since then, oh, I imagine about four, five times.

"Question: When was the last time?

"Answer: I imagine about August.

"Question: Around August?

"Answer: Yes.

"Question: And is that Florida ticket the only ticket he sold to you?

"Answer: Yes.

"Question: To you now?

"Answer: Yes.

"Question: Did any other members of your family receive any tickets through that source?

"Answer: Just that one flight that I took my whole family, my and my wife and three children.

"Question: And yourself?

"Answer: Yes.

"Question: There were no other tickets that you or your wife or your three children used, right?

"Answer: No.

"Question: As far as coming from this source?

"Answer: Just the five tickets. That's all.

"Question: Now, did you get any tickets for any relatives?

"Answer: No.

"Question: Did you get any tickets through this source for anybody else?

"Answer: Yes.

"Question: For whom?

"Answer: Steve Moltese (phonetic).

"Question: Anybody else?

"Answer: Yes. There was another one, Danny Kilgallon (phonetic). Yes. Another close friend of mine.

"Question: Where does Danny live?

"Answer: In Kew Gardens someplace.

"Question: Do you have the address?

"Answer: No.

"Question: How do you get in touch with Danny?

"Answer: He comes into my place of business.

"Question: What does he do for a living?

"Answer: He's a milkman.

"Question: Do you know what dairy he's with?

"Answer: Hegerman Holland, I think it is.

"Question: How often does he come?

"Answer: Twice a week.

"Question: Twice a week?

"Answer: Yes.

"Question: Now, any particular days?

"Answer: No. Just whenever he's around.

"Question: How were these tickets delivered to you? You did receive the tickets, didn't you?

"Answer: Yes.

"Question: What did you do, act as more or less a middle man?

"Answer: Well, not a middle man. Insofar as the fact is that I would get in touch with Mike and tell him that a friend of mine would like to get some tickets and naturally I would give Mike whatever information was involved and then Mike would deliver them to me.

"Question: And Mike would talk to the guy. You wouldn't talk to him at all?

"Answer: No, because it's his friend. When I heard it was such a good thing then I passed it onto a friend of mine and that was Steve Moltese and I got him a few and I got in touch with Mike to get in touch with this fellow Charlie because I didn't know him.

"Question: But Mike was the one that made the contacts with Charlie?

"Answer: Yes.

"Question: But you seen Charlie?

"Answer: Yes.

"Question: You had seen him on a number of occasions?

"Answer: Yes. At least four times.

"Question: You think you would be able to recognize him?

"Answer: Yes, I think so.

"Question: What does he look like?

"Answer: A very small man, very thin, very pale, pointy nose.

(Witness shown picture.)

"Question: Who is that?

"Answer: That's Mike, whatever his name is.

"Question: That's Mike?

"The Foreman: There's no name on the front of the picture. The name on the back is Michael Frank Argondizzo.

"Question: Can you tell us the location?

"Answer: 53-57 Metropolitan Avenue.

"Question: That's in Queens?

"Answer: Cross Roads Bar, Metropolitan Avenue.

"Question: Do you know a fellow by the name of Steve from New York City?

"Answer: No.

"Question: You don't?

"Answer: No.

"Question: Lives on Mott Street.

"Answer: No.

"Question: You know no Steve living on Mott Street?

"Answer: No.

"Question: Do you know a Wally Cascio?

"Answer: No.

"Question: You don't know a Wally Cascio?

"Answer: No.

"Question: How about a Paul Della University?

"Answer: No.

"Question: Now, when was the last time you saw Mike A, Mike we discussed before?

"Answer: Right outside.

"Question: Before that when was the last time?

"Answer: Well, I have been in contact with him, I would say like every two weeks.

"Question: When was the last time you saw him now that yourecall?

"Answer: Last week he was in my place.

"Question: Last week in your place?

"Answer: Yes.

"Question: And you hadn't seen him since then at any other location?

"Answer: No. The only other time I have seen him is at my place of business.

"Question: Has he ever been to your home?

"Answer: No.

"Question: Have you ever been to his?

"Answer: Yes. Once.

"Question: With whom were you there?

"Answer: Alone.

"Question: Just you and --

"Answer: Just myself.

"Question: Was there anybody else there besides the people that live there and that's referring to Argondizzo or his wife or his children if he has any?

"Answer: Well, actually I never went up in his apartment. I just called for him because his phone was out of order and I had no way of getting in touch with him and I wasn't in his apartment. I was not in his apartment.

"Question: So you were never inside it?

"Answer: No.

"Question: Now, you run into somebody

by the name of Wally?

"Answer: No. I don't know any Wally.

"Question: You don't know any Wally?

"Answer: No.

"Question: You were talking before about a friend of yours named Steve Moltese.

"Answer: Right.

"Question: Now, did you actually hand him the tickets, is that what happened? When you got them?

"Answer: Yes. I think so. I think I handed him whatever was --

"Question: Do you know a girl by the name of Mary Tringali (phonetic)?

"Answer: Mary Tringali?

"Question: Yes.

"Answer: No.

"Question: Have you ever seen Moltese with anybody other than his wife?

"Answer: Yes.

"Question: Who was that?

"Answer: Girl named Miriam.

"Question: Did you ever hand her any tickets?

"Answer: Yes.

"Question: How many tickets did you hand her?

"Answer: I don't remember. Could have been two, three.

"Question: Are you talking about two occasions or two tickets?

"Answer: Two or three tickets because one time it was something involved, she was going with her children so I don't remember that.

"Question: Did she pay you money for that or he or who?

"Answer: He did.

"Question: He did?

"Answer: Yes.

"Question: Now, what's your mother's first name?

"Answer: Anna.

"Question: What's your father's name?

"Answer: Leonard.

"Question: Now, the Alfano side of the family now, what are your uncles' names?

"Answer: I only had one uncle.

"Question: What's his name?

"Answer: Joseph. He's dead.

"Question: Joseph?

"Answer: Yes.

"Question: There's no Thomas or Theodore or something like that?

"Answer: No.

"Question: Did you get any tickets for anybody else by the name of Alfano?

"Answer: No.

"Question? Approximately the latter partof June, 1973, did you fly to Forida?

"Answer: No.

"Question: Did anybody you know fly to Florida?

"Answer: My children, two of my children.

"Question: What are their names?

"Answer: One is Rosemary and one is Antoinette or Toni, may have been on the ticket.

"Question: Where did you get these tickets from?

"Answer: From the same place I got my original five. I had bought five all at once.

"Question: So there are other tickets?

"Answer: I bought five tickets total. Myself, I sent them as soon as they got done with school. Approximately June 30th. I sent them on first and then I traveled later on in July.

"Question: That was on Eastern Airlines?

"Answer: I don't remember if they went Eastern. I think they went National.

"Question: How about 6/24 Eastern Airlines, JFK to Florida?

"Answer: It's possible that they went Eastern. I don't remember. I know mine but I had with National. I transferred them over to Eastern myself because I didn't like to fly National. Those were mine but their's, I imagine, their's could have been Eastern. It's possible.

"Question: Do you own any part of the Cross Roads Bar?

"Answer: No. I don't.

"Question: Do you have any interest in it whatsoever?

"Answer: No. I don't.

"Question: Have you ever?

"Answer: No.

"Question: Have you ever had any interest in any bar?

"Answer: No.

"Question: Have you ever had any business interest besides working at the Cross Roads while you have been there?

"Answer: No.

"Question: So the Cross Roads is strictly your --

"Answer: My main source of income.

"Question: Bob who?

"Answer: Samponge.

"Question: He represented him?

"Answer: Yes.

"Question: You started to say partner.

"Answer: No. My lips are very dry. Well, he is my partner because we are partners in the house -- in the bar.

"Question: Did you start to say partner or what?

"Answer: Maybe I did, yes.

"Question: What's your salary at the Cross Roads?

"Answer: $150 a week.

"Question: And that's all you make?

"Answer: Yes.

"Question: You drive a car?

"Answer: Yes.

"Question: What kind of a car do you drive?

"Answer: '73 Cadillac.

"Question: You own your own home?

"Answer: No.

"Question: Apartment?

"Answer: What's that?

"Question: You rent an apartment?

"Answer: Yes.

"Question: What's the location of that?

"Answer: 64-52 Madison Street.

"Question: Is that in Queens or New York?

"Answer: Queens.

"Question: You have no other source of income, is that correct?

"Answer: No. I don't own the car. It's leased by Mr. Samponge.

"Question: Do you own any other cars?

"Answer: No."

MR. CUNNINGHAM: At that point he was excused.

THE COURT: Thank you.

MR. ROSNER: Might we approach the side bar for a minute?

(Whereupon, the following took place at the side bar.)

MR. ROSNER: Just to make the record clear, your Honor, I wanted to protect my rights in respect to any proof of other crimes that is included in the grand jury testimony that was read. I assume your Honor understands the objection.

THE COURT: Your objection stands and it is overruled and you can have an exception.

MR. ROSNER: Thank you.

(Whereupon, the following occurred in open Court.)

THE COURT: Suppose we cover the voice identification first? We haven't had anything in the jury about voice identification. Do that before you pass out the transcripts.

MR. CUNNINGHAM: Ladies and gentlemen, you're going to be hearing a tape recording. There is going to be a male voice on the tape who answers to the name of Larry. There has been a stipulation between counsel that Larry is identified on this tape, the man who answers to the name Larry has in fact been identified as the defendant Larry Alfano.

MR. ROSNER: That's correct, your Honor.

THE COURT: Now let me also say that when we admit tapes into evidence, whether consentable tapes, when we let tapes in evidence, tape recording is a transaction of a conversation. That is what has been heard and what I have ruled is admissible in evidence under the law as it stands. The transcript which you are given to help you listen to the tape, if you hear something on the tape that isn't on the transcript it is what you hear that governs. If you see something on the transcript and you don't hear it on the tape, treat it as if it were not in the transcript. Because the transcript is for your guidance but the tapes is your evidence.

MR. CUNNINGHAM: Your Honor, there is request by counsel to delete portions on the tope of this transcript.

THE COURT: Yes.

You may proceed.

(Whereupon, the tape was played to the jury.)

THE COURT: Mr. Cunningham, what is next?

MR. CUNNINGHAM: Your Honor, may we have a side bar?

THE COURT: All right.

(The following occurred at side bar.)

MR. CUNNINGHAM: I'm out of witnesses, your Honor.

THE COURT: You can't find any of them?

MR. CUNNINGHAM: If we could have the jury dismissed I would like to make an application. I would like to explain infull detail.

THE COURT: What is your situation on Monday? will you be able to start at 12 or 2?

MR. ROSNER: I'm not sure, your Honor. Because I don't know how the Appellate Division works. The Second Department calls their calendar, I think there are 25 cases and I don't know how they are enunciated.

THE COURT: You better make it 2 o'clock.

MR. ROSNER: I don't know whether they require you to respond to the calendar call.

THE COURT: Yes. I believe my secretary indicated you are on the calendar second.

THE CLERK: They said you could argue first.

MR. ROSNER: The calendar call is at 10.

THE COURT: You were first, you ought to be called --

MR. ROSNER: I'm number 1 and 23. I asked for that.

THE CLERK: That was my understanding with the other clerk. I told him you were number 1 and 23. He said now you could be number 1 and 1-A.

MR. ROSNER: I hope not, I would like a breather between the first and second appeal.

THE CLERK: He seemed to suggest that your request would be granted.

THE COURT: Mr. Rosner doesn't want that much of a favor here.

MR. ROSNER: Theyboth involve the same transaction.

THE COURT: It's 10 o'clock.

MR. ROSNER: That's a 10 o'clock call.

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THE COURT: Then they give you an hour each?

MR. ROSNER: I'm trying to remember how much time. No, not an hour. If both sides, they get about 20 minutes each. I think that's what they request in each instance. I would suspec t they would call the calendar and hear any arguments, they'll probably get started late. I've never seen, with all due respect, I've never seen an Appellate Court go through a 25-case calendar in less than 15 or 20 minutes. There are applications.

THE COURT: We'll have the jury come back at 12. Or we'll put it over to 2 o'clock.

MR. ROSNER: I'll report to your Honor's chambers as soon as I'm finished.

(The following took place in open Court.)

THE COURT: Ladies and gentlemen, I am told we're still waiting for some witnesses. We can't go on any more. It's been a short day but we made some progress. I said we wouldn't work all day Monday morning. One of the counsel has to be away in the morning.

Will you please be here at 12 o'clock on Monday and I hope we may be ready to go ahead.

Meanwhile, it's a long time until Monday but remember don't talk about the case amongst yourselves.

Don't talk about it at home or with anyone else and don't talk at all to the people who are in the courtroom whom you may see and elsewhere.

Thank you. I'm sorry we can't do more today.

(Jury excused.)

THE COURT: All right, Mr. Cunningham?

MR. CUNNINGHAM: Your Honor, I have an affidavit here which I haven't had an opportunity to read before I sign it. I would request just a moment.

THE COURT: Yes.

MR. ROSNER: Your Honor, do these require our presence?

THE COURT: I don't suppose it does.

MR. ROSNER: I assume it has to do with the witness.

THE COURT: I presume it's an application for a material witness warrant.

MR. CUNNINGHAM: That's correct, your Honor.

THE COURT: I'm going to require Mr. Cunningham to go ahead and complete his case on Monday afternoon. I wonder if you have any notion, Mr. Rosner, whether you will have a defense case?

MR. ROSNER: Well, there will be a defense case, your Honor. I do not anticipate starting it Monday afternoon based on what I assume from Mr. Cunningham's intention is to call the three witnesses and possibly offer additonal tapes.

THE COURT: With respect to the other tapes, you said that it would change admitting earlier tape. That would affect your trial strategy in what way? In what way is that?

MR. ROSNER: Indeed, your Honor, the tapes, the one tape that we did have which spoke in terms of the defense of the matter as I indicated I think in my opening statement and I think in the direct case and in my cross-examination on the question of knowledge. If I might with the Court's permission just reconstruct the chronology for the Court?

THE COURT: Yes.

MR. ROSNER: Indictment 74-CR-818 was filed on December 28, 1974, containing two counts of alleged unlawful and knowing possession of five airline tickets. There was an omnibus motion that was returnable before your Honor on February 21, 1975, seeking dismissal, discovery and particulars.

I believe it was while that motion was pending the determination on April 15, 1975, the Government filed the indictment before your Honor again containing two counts and the same five tickets. The indictment was labeled superseding indictment over 75-CR-818.

I can only assume that one of the reasons that if not the reason for filing the superseding indictment was to obviate any potential legal impediment for our motion to dismiss. Thereafter by a Bill of Particulars and discovery set forth in the Government's letter of April 22, 1975, I wsa furnished with the five copies of the five tickets that had been received in evidence as Government's Exhibits 1 to 5. I was furnished with a transcript of the August 7, 1973, tape recording.

I had asked as a matter of fact, I demanded in the Bill of Particulars for any and all other airline tickets that the Government intended to offer into evidence. The Government's attorney did not furnish that to me. I made additional requests and got the defendant's testimony before the federal grand jury that returned this indictment.

On May 9, 1975, at the hearing before your Honor on the motion to suppress, page 38 and 39, I asked again for the representation from the Government as to whether they intended to introduce any additional tapes or transcripts and the response from the Government was no. This is on September 12 --

THE COURT: Wait a minute. Not page 38 and 39?

MR. ROSNER: I'm sorry, your Honor. If I

misspoke I thought it was the -- your Honor, it's pages 42 and 43.

THE COURT: You said you received 8 sheets. Those are what were received today.

MR. ROSNER: That was received.

THE COURT: I assume that was the only tape or recording Mr. Cunningham intended to introduce and Mr. Cunningham said yes.

MR. ROSNER: Thereafter, your Honor, on September 12, 1975, when October 15th was scheduled as the trial date I had addressed a letter to the Government counsel with a copy to the Court asking for any amendment or additions to the particulars, discovery et cetera asking for Brady material indicating what I thought appropriate. In addition, the Government had a continuing obligation to comply with the discovery and the particulars.

On October 7, 1975, I directed a letter to your Honor with a copy to the Government counsel making reference to the September 12th letter with respect to the discovery and Brady material.

Now, in the middle of the trial the Government seeks to offer all or certain of 9 other taped conversations. Those conversations taken together with grand jurytestimony of the witnesses Kilgallon and Samponge and Maltese in my judgment are subsequent criminal acts of possession of unlawful airline tickets and perhaps evidence of some other conspiracy and perhaps even shylocking and usury. After I received the initial information I intended to offer the defendant's grand jury testimony in the state court.

THE COURT: What is the answer to that?

MR. CUNNINGHAM: Your Honor, that is not my understanding. I received a copy of that from counsel, I received it today --

MR. ROSNER: I would submit, your Honor, with the series of events permitting the Government to introduce the tapes and the transcripts, either the tapes or the transcripts of these 9 other conversations at this stage of the proceedings would really be in substance with the Court of Appeals as referrin to in the Kelly case as "trial by ambush."

In the Kelly case they're talking about testimony that according to the experts required some 2 or 3 weeks to verify. Here I think we have problems even greater than that in as far as the defense is concerned. The fear of this, obviously we haven't verified the tapes against thetranscripts. I haven't heard them and I don't even know whether the

Government's counsel to this date has listened to them or merely read the transcripts.

MR. CUNNINGHAM: I've read the transcripts.

MR. ROSNER: Additionally, the defendant is caused an embarrassment that was not caused in Kelly by having in mid-trial to make efforts to shift the direction which the defense is prepared and is going.

I would submit it is obvious even with the 6-month rule that there is going to be adopted, I assume there has got to be reasonable adequate preparation and a reasonable part of the preparation is compliance with the pre-trial and particular requirements.

THE COURT: Let me interrupt you, Mr. Rosner.

(Short recess.)

THE COURT: You said you had to shift directions of your defense. I'm not sure how that is true. You already had the tapes which I think you mistakenly thought were excludable. So, how is that related?

MR. ROSNER: There's one tape and now --

THE COURT: It's the tape.

MR. ROSNER: We had a tape, one tape, your Honor. I respectfully disagree with your Honor's rulings as I indicated, as I knew you would.

THE COURT: You have a right to --

MR. ROSNER: It is one thing to be faced the tape with this verbiage on there. I had occasion to read the transcripts of the 9 new tapes. It is a vastly different series of conversations. Both in tone and in context. Candidly, if I had gotten those tapes last April when I got this tape that was received in evidence, my preparation I can say without any equivocation would have taken a completely different turn.

MR. CUNNINGHAM: Your Honor, if I could respond for a moment?

THE COURT: How many of these tapes were you planning to offer?

MR. CUNNINGHAM: Your Honor, I was going to hopefully, well, be able to have Mr. Samponge and Mr. Maltese and Mr. Kilgallon present. That's going to determine the matter, as to who will come into Court. Who comes in. I can honestly say at this time, your honor, I don't know.

THE COURT: Well, suppose they all come, how many tapes?

MR. CUNNINGHAM: I probably would want to offer them all.

THE COURT: Even if they come?

MR. CUNNINGHAM: I could very well offer them all. I want to have, I haven't had a chance to be very candid, I want to talk to the witnesses before I put them on the stand and see what they say, what is said and I will say which tapes.

I have not had an opportunity to talk to the witnesses. They have failed to appear.

THE COURT: Maybe you ought to look at the tapes and see how they affect the case. I've not seen transcripts, have you a set for me?

MR. CUNNINGHAM: Yes, I believe they are upstairs. I can have them brought to your chambers immediately after I leave here, your Honor.

THE COURT: Mr. Rosner says he hasn't heard them.

MR. CUNNINGHAM: I'll be glad to play them.

MR. ROSNER: I don't think Mr. Cunningham has them.

MR. CUNNINGHAM: I had them brought over to my office this morning.

MR. ROSNER: If you can send them to the Appellate Division Monday morning I'll listen.

MR. CUNNINGHAM: Your Honor, I would like to reply to a couple of things that were said by Mr. Rosner.

Starting off with the very beginning, the reason for the superseding indictment was a typographical error that was in the first indictment which incorrectly set forth the number on one of the tickets. We came down with the superseding indictment similar to it.

THE COURT: It was a mistake on behalf of the typist?

MR. ROSNER: It could have occurred in the Bill of Particulars, which it was and the discovery.

MR. CUNNINGHAM: There was no other change either substantive or procedurally in the Government's indictment.

As far as the defendant changing the direction of his defense, he referred to different tactics on his cross-examination. I wish that perhaps he would elaborate on that as to what different tactics he would take on the cross-examination?

THE COURT: He didn't say cross-examination. He said his direction of the case --

MR. ROSNER: What I said, I had to cut the tactics of the defense which was evident from the way I cross-examined in my opening statement than if I had been aware of these tapes and the Government's intention to use them. I probably would have prepared my entire approach --

MR. CUNNINGHAM: How --

MR. ROSNER: I don't think I'm required to tell you.

THE COURT: He doesn't have to.

MR. ROSNER: How many tapes are you going to put in which I haven't yet gone over?

MR. CUNNINGHAM: I think the record should reflect --

MR. ROSNER: Might I, your Honor, I have not heard yet any reason why the Government, having access to multiple tapes and transcripts not of the defendant, one of the defendant but other defendants in related cases, therefore they could have diligently gotten anyone they wanted. I have yet to understand since the original indictment was returned in December of 1974, that the request for the tapes and transcripts et cetera were made in February of 1975 and your Honor had a hearing on the motion to suppress in all of the related cases in May of 1975. At which time, the District Attorney's office produced all of the documentation before the case started. Why couldn't the Government have gotten them then. Now they produce them in the middle of the trial.

MR. CUNNINGHAM: Your Honor, if I could respond.

I'm sorry Police Officer Wadell is still not here in Court. I would ask him to take the stand. When I asked him this morning as to whether or not he also could identify the voice of Mr. Alfano, he stated, "Certainly, without any problem." And I said, "Why is that?" He said, "I listen to him every day for 9 solid months while I was on that wiretap." He was listening to these tapes for 9 months of Mr. Alfano and some of his associates. I don't think the Government can be expected to listen to everyone of those 9 months of tapes to try and determine --

THE COURT: Somebody must have listened to them to determine which these 9 are.

MR. CUNNINGHAM: Yes, your Honor.

THE COURT: How did that come about at this stage?

MR. CUNNINGHAM: At this stage, your Honor, I was given a series of tapes when Mr. Hammerman, an Assistant District Attorney from Kings County came over and he said, "I think I have something here you might have an interest in," and I said, "What does that mean?" He handed me a series of tape recordings.

MR. ROSNER: Did the Government make any further effort prior to that to obtain any other tapes?

THE COURT: What request had you made for them prior, as to locating anything else?

MR. CUNNINGHAM: Your Honor, I've been talking with Mr. Hammerman since I became involved in this case, some 9 months ago. It was in the beginning of January of last year. Your Honor, for awhile as the Court knows I've tried 3 of these cases before your Honor and in each case I had been in contact with Mr. Hammerman and the last gentleman, Mr. Freundlich, who was formerly in charge of the case.

The force of their investigation was going to loansharking, to usury and to gambling which was their principal concern and most of the conversations that we did have were talking about what their concern was, as far as they were concerned this whole thing about airline tickets was not a facet of the investigation.

MR. ROSNER: Might I, your Honor?

THE COURT: The question is whether you made a specific request for them before this and how long before to get any conversations that related to airline tickets?

MR. CUNNINGHAM: Your Honor, I had no idea --

MR. ROSNER: Last February I made a motion, we made for particulars and discovery. I specifically asked for and I quote, "Any and all tape, wire and other recordings, however made and including duplicate transcripts of all conversations and talks to which the defendant was alleged to have been a participant."

MR. CUNNINGHAM: Your Honor, I believe I can respond to that by letting counsel know --

MR. ROSNER: If I can, Mr. Cunningham, you did respond to my letter of April 22nd which contained the particulars and the discovery and it said the Government is not aware of any other transcripts and when they become aware of them they will let me know. On the 12th, on September 12th, which might conceivably have enabled me to do something about it on September 12th, I wrote to Mr. Cunningham with a copy to your Honor's chambers. We received a notice from the Clerk of the Court that I should appear on a matter that was scheduled before your Honor in this courtroom on 11/6 at 10 a.m., Wednesday, October 15, 1975, with respect to this matter a request is respectfully made at this time for an amendment or an addition to the Bill of Particulars set forth --

THE COURT: He said that before, I think.

MR. ROSNER: Apparently he didn't reciprocate with a call to find out whether there was anything else.

MR. CUNNINGHAM: Your Honor, as far as the tapes are concerned I did respond as far as the actual recording of all 10 phone calls, it was produced from the electrical surveillance of the defendant's place of employment and they are in the possession of the Kings County District Attorney's office and the Government has no objection to the defendant and or his counsel in seeking the same.

In other words we could not physically go over it.

THE COURT: The question is whether you made a diligent effort beforehand.

MR. ROSNER: You mean this one that he was going to offer?

THE COURT: If he didn't, how serious is the prejudice to Mr. Rosner's client? I'll look at the tapes and I'll consider it. I may not rule on it if I hear what other witnesses you have on Monday.

MR. ROSNER: I appreciate that one opportunity to go over the District Attorney's office. We could have gotten a court order to get disclosure be that as it was in the issue, the issue was what the Government was going to offer. As to that we were entitled to hear it.

THE COURT: It's a bigger job for you as the Government to go through all the tapes. When did you get a list or at least a log book of the tapes?

MR. CUNNINGHAM: Your Honor, I have a log book upstairs. I believe, and what it says on it, John to Mary such and such a date with a number. The place of employment, their place of location, of the tape and it was the Cross Roads Bar.

Mr. Alfano as an employee of the Cross Roads Bar on almost every -- I'd say better than 75 or 80 per cent of theconversations were between Larry and other people. In other words there were several minutes --

MR. ROSNER: It seems to me that every time they had a Larry --

THE COURT: It would have been possible to go to the conversations during a 3-month period.

MR. ROSNER: I would also inquire in light of that revelation, your Honor, if 80 per cent of the tapes involve the defendant Alfano, who made the selectivity of producing the 9 tapes that had been produced? 80 per cent of the conversations involved the defendant Alfano.

There must be during the period covered by the tapes that were produced, which was early June to the end of July, there might be literally thousands of tapes with the defendant Alfano. Somebody did make a selection of these 9.

THE COURT: There are literally hundreds of them. Probably on just gambling counts, if that was involved --

MR. CUNNINGHAM: I would appreciate it if --

THE COURT: Trial on the gambling case in Kings County, is that they happened to go through these things?

MR. CUNNINGHAM: I don't know.

THE COURT: I wonder in getting to the trial of the gambling case in Kings County that's how they happen to pick these things up.

MR. ROSNER: I don't represent Mr. Alfano in the state court, your Honor.

THE COURT: Let me have the transcripts and I'll decide what to do about it.

MR. CUNNINGHAM: Your Honor, may I be heard for a moment?

THE COURT: Yes.

MR. CUNNINGHAM: I have an affidavit here and unfortunately --

MR. ROSNER: May we be excused?

THE COURT: Yes.

MR. CUNNINGHAM: I'll submit it to the Court. It has not been raised as yet.

I do so swear that the information contained therein is true to the best of my knowledge and belief.

THE COURT: Suppose you correct the August to October in here.

MR. CUNNINGHAM: Yes.

THE COURT: You have a pen. What are you going to do about the other two?

MR. CUNNINGHAM: Your Honor, Sampogne, I'm going to also ask for a bench warrant and Mr. Sampogne and Mr. Kilgallon who is supposed to contact me today, he's supposed to be going to the doctor's here and supposed to be here at 2 o'clock this afternoon. I'll ask for a bench warrant.

THE COURT: All right, you'll have it.

(Whereupon, these proceedings were concluded at 3:40 p.m.)

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 73-CR 298
74-CR 818

LAWRENCE ALFANO, :

Defendant. :

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United States Courthouse
Brooklyn, New York

October 20, 1975
12:00 o'clock A.M.

Before:

HONORABLE ORRIN G. JUDD, U.S.D.J.

FRANCES KARR
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MYLES CUNNINGHAM, ESQ.
Assistant U.S. Attorney

JONATHAN ROSNER. ESQ.
Attorney for Defendant

THE CLERK: Criminal cause on trial, United States of America v. Lawrence Alfano.

THE COURT: Good morning, gentlemen. Mr. Cunningham, have we witnesses today?

MR. CUNNINGHAM: One very short witness, and the Government will rest, your Honor.

In regard to the additional tape recordings, they were provided both to the Court on Friday and also a couple of days prior to defense counsel. The Government does not intend to offer them into evidence. I made inquiry into the whereabouts of the tapes and the availability to the Government. I think in all candor the Government probably could have obtained the tapes prior to the time that it did.

MR. ROSNER: I would like, your Honor, to commend the Government for the position they have taken. I appreciate it both personally and professionally.

THE COURT: Is this one of the travel agents you were going to have Friday afternoon?

MR. CUNNINGHAM: No, I am not going to call a travel agent. I have the documentation here. I believe in one of the Government exhibits, the Government exhibit dealing with the hot sheet, No. 55 referred to bulletins No. [illegible], bulletin No. 49, bulletin No. 50 and there was also an additional bulletin No. 55 which sets forth the loss.

Excuse me, your Honor the Government's position today will be we would ask these be received into evidence, that the airline tickets be received in evidence and the Government will rest.

MR. ROSNER: I have a problem in light of this turn of events. Quite frankly, I anticipated the Government taking up today with the other three witnesses and the tapes which I had assumed they were going to proffer. I will not be prepared until the first thing tomorrow morning to put witnesses on. I would represent to the Court that based on my present understanding of the posture of the case I would not be more than an hour in total. I apologize but I am meeting a witness this afternoon after court that I contemplated putting on the stand tomorrow.

THE COURT: Couldn't the marshal find the witnesses?

MR. ROSNER: No, your Honor. I do not think the witnesses anticipated being found.

THE COURT: All right, let us bring in the jury and we will do what we have to do.

(The jury took its place in the jury box.)

THE COURT: Good afternoon, ladies and gentlemen

5 and thank you all for being here. Mr. Cunningham, are you ready to proceed?

MR. CUNNINGHAM: Yes, your Honor. The Government recalls as its next witness Frank Scinta.

FRANK SCINTA, called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: Mr. Scinta, you have been sworn already in this case. You can take the witness stand and you are under oath.

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q Good morning, Mr. Scinta.

Mr. Scinta, last week when you testified, Government 17 was introduced in evidence --

MR. CUNNINGHAM: I would ask this be marked.

THE CLERK: One-page document marked Government Exhibit 20 for identification.

THE COURT: It cannot be 20.

THE CLERK: We have a 20 already. I am sorry, Government's Exhibit 23 for identification, and also Government's Exhibits 24, 25 and 26 for identification.

MR. CUNNINGHAM: I believe 55 was already in evidence as Government's Exhibit 17. I am removing it.

Q Sir, I show you Government Exhibit 23 and ask you if you can tell us what that is, sir.

A This is a bulletin, No. 49. dated May 30, 1973 to the review accounting agency, Security Committee of the airlines of my office, and the subject is stolen ATC tickets.

Q Mr. Scinta, are we correct in assuming this is a blacklist of tickets?

A That is right.

MR. CUNNINGHAM: I would ask this be received in evidence as Government Exhibit 23.

THE COURT: Have you looked at it?

MR. ROSNER: I object to it, your Honor. If we might approach the side bar?

(Side bar held without the hearing of the jury, as follows:)

MR. ROSNER: As to No. 23, I do not think there has been a proper foundation as yet. Specifically as to 24 and 25, before the witness is shown those exhibits, I think they relate to possible proof of other crimes not charged in the indictment which do not appear to be connected with the defendant Alfano. I point out to the Court No. 24 and 25 have to do with Odyssey Travel Agency of which there has been no testimony and 25 has to do with Ambassador Travel, about which there is no testimony.

THE COURT: These cover Greenwald and Baboy.

MR. CUNNINGHAM: I am offering 23 in evidence and 24 and 25 I simply want to have marked for identification so the Government will be complying with the Court's request to bring all documents referred to in Exhibit 17 before the Court.

THE COURT: Well, I would suppose 23 is admissible, is it not?

MR. ROSNER: Assuming a proper foundation is laid.

THE COURT: You have to show where he got it in the regular course of business. What are these?

MR. ROSNER: I do not have the slightest idea.

THE COURT: The writing, Mr. Cunningham.

MR. CUNNINGHAM: Those are the tickets. This probably should be redacted off there which I can do. It talks about tickets being validated by the Grimes Travel.

THE COURT: We have had Grimes in the case. Ask him about it.

(The side bar was concluded.)

BY MR. CUNNINGHAM:

Q On Government Exhibit 23 there is some handwriting at the bottom of that ticket. Is that your handwriting?

A No, sir.

Q Do you know what it pertains to?

A I do not.

Q Referring to Government Exhibit 23, what is the origin of that document, do you know sir?

A This document originated in the office of the Enforcement Air Transport Association office which I represent.

Q And is that a record kept in the ordinary course of business?

A That is right.

Q And then it is mailed out to various members of the Air Transport Association?

A To the various airlines, yes.

Q And to the various airlines.

MR. CUNNINGHAM: I would ask this document be received in evidence and have the bottom portion, which apparently appears to be some handwriting, redacted from it.

THE COURT: All right. According to the ruling at side bar it may be received.

THE CLERK: Government Exhibit 23 marked in evidence.

(So marked.)

MR. CUNNINGHAM: At this time I would ask that the five airline tickets Government's Exhibits 1, 2, 3, 4 and 5 be received in evidence.

THE COURT: Is there any objection, Mr. Rosner?

MR. ROSNER: I do not think a sufficient foundation has been laid by the earlier testimony.

THE COURT: Well, there may be a question for the jury on that. I will receive them in evidence.

THE CLERK: Government's Exhibits 1 through 5 marked in evidence.

MR. CUNNINGHAM: I would further ask your Honor that the tape recording and the line sheet of that tape recording be received in evidence at this time.

THE COURT: Were they not already marked?

MR. CUNNINGHAM: I thought they were. There does not seem to be any notation on the exhibit.

THE COURT: I guess we did not actually get back to it. Is there any objection, Mr. Rosner, to Exhibits 18 and 19 being received in evidence?

MR. ROSNER: I hate to say this, your Honor, but I have been laboring under the assumption that 1 through 5 and 17, and 18 had already been received in evidence.

THE COURT: The tape could not have been played if it had not been deemed in evidence.

MR. ROSNER: I think with respect to some of the tickets I voiced an objection and your Honor overruled me and received them at that time.

THE COURT: 18 and 19 will be marked in evidence.

THE CLERK: So marked.

MR. CUNNINGHAM: Your Honor, I have no further questions of this witness, and the Government rests.

THE COURT: Mr. Rosner may want to cross-examine the witness.

MR. CUNNINGHAM: I am sorry, your Honor.

CROSS-EXAMINATION

BY MR. ROSNER:

Q Mr. Scinta, you have previously seen Government Exhibit 22, have you not?

A That is right.

Q Do you recall when you first saw that?

A Last Thursday.

Q That was the first time you saw that?

A That is right.

Q Do you recall when Wings and Wheels first notified the Air Transport Association of these missing tickets?

A No, sir.

Q You have no idea?

A No.

Q Have you ever seen a Wings and Wheels overshort and damage report before?

A Never.

Q I assume your answer would be the same with respect to Exhibit 10?

A That is right.

Q Directing your attention to Government's Exhibit 23 and 17, you have testified, I believe, that the handwriting on Exhibit 23 is not your handwriting and you do not know who put the handwriting on there?

A That is correct.

Q Would your answer be the same with respect to Government's Exhibit 17?

A That is right.

Q With respect to both of these exhibits, did you prepare these?

A No, sir.

MR. ROSNER: I have no further questions.

THE COURT: Is there any redirect?

MR. CUNNINGHAM: No, your Honor, there is not.

THE COURT: You are excused, Mr. Scinta. Thank you.

MR. CUNNINGHAM: At this time, your Honor, the Government rests.

THE COURT: All right, I will ask the jury to go back to the jury room for a few minutes and still do not talk about the case.

(Jury left courtroom.)

THE COURT: Mr. Rosner is there any basis for a motion?

MR. ROSNER: I would make a motion to dismiss on the grounds that among other things, that the Government has offered the subsequent tape which I think is No. 18 offered in evidence of the defendant's knowledge at the time of the alleged possession. The only proof of possession insofar as my recollection is still with me, is the testimony offered, and I forget what exhibit it is, by the defendant's grand jury testimony.

THE COURT: Yes.

MR. ROSNER: I think it is safe to say that there is no proof even of physical possession or custody by the defendant of the tickets.

I would respectfully submit, your Honor, that the tape recording of August 7, 1973 which is Government Exhibit 18 and the transcript which is Government Exhibit 19, on the issue of knowledge as distinguished from the issue of subsequent and motive, etc., is inadmissible to relate back to the defendant's knowledge at the time of the alleged possession, which concededly must have been in respect of two of the tickets in June and in respect of three of the tickets either in June or early July, I forget which, and the evidence subsequently of his conversation would not relate back to establish prior knowledge.

I would submit a number of cases I cited to your Honor last week which clearly distinguish between subsequent acts and subsequent to knowledge and suggest a distinction which is significant, that is between proof of subsequent and proof of knowledge.

Absent that, I do not think the Government has any proof of knowledge.

THE COURT: Well, if it establishes possession and the possession was within the brief time after the theft, the jury can infer knowledge from that.

MR. ROSNER: Well, again, your Honor, with respect to the language your Honor used, brief time, I think the evidence before the Court indicates as an example, that there was between two weeks and one and a half month interval between the carrier, Wings & Wheels, ascertaining that these tickets were missing, lost or stolen, and the time that they notified anybody that there was another hiatus of between two weeks and a month between the notification and the issuance of the so-called blacklist. I think that period of time insofar as the proof of the defendant's possession is concerned coming at the end actually took a week to three weeks subsequent to the issuance of a blacklist attenuates the inference of knowledge of proof of possession. I think the time span here is much too long.

While the handwriting has not been received on Government's Exhibit 23, I think it indicates the tickets had been passed prior to the June 15 date of that particular exhibit. In this instance, the proof of possession, slight as it is, from the defendant's own mouth is subsequent to even that June 15 date.

MR. CUNNINGHAM: Your Honor, there are other indicia in this case as to the guilty knowledge of the defendant. One is the example that he admitted most candidly in the grand jury that he bought these tickets at one-third discount. There was testimony by Mr. Scinta that you cannot offer to sell discounts at a discount. There was also evidence that these tickets were written by a travel agent and the travel agent was found to have had the plate that was utilized -- was found to have been stolen or a counterfeit plate. There are things not in the ordinary course of business with Mr. Alfano.

MR. ROSNER: If I may respond to the last first.

The proof in respect of the alleged counterfeit plate which is, I think, Government's Exhibit 13, I think is directed, if at anything, at evidence that the two tickets issued -- the three tickets issued by the Central Tours were not authorized to be issued by Central Tours. I do not think since there is no evidence linking up that Central Tour plate, Exhibit 13, to the defendant and more significantly, since the Government's own witnesses testified, from the ATA and from Rand-McNally and Mr. Zackaroff, if I have the name correctly from Wings & Wheels, all indicated that on the face of the tickets there cannot seem to be anything amiss and I believe Mr. Yordis, based on his experience and knowledge in Rand-McNally ticket sales division, observed that the tax amount, the amount of tax was not entered on the ticket. That was the only thing that would raise suspicion in his mind.

The proof in respect to the alleged counterfeiting of Central Tours' name to the ticket is not in my judgment, I would respectfully submit, any knowledge whatsoever on the part of Mr. Alfano.

In respect of the discount, I may be incorrect in my recollection, but my recollection is that there was some indication of belief on Mr. Alfano's part. I think it was in the grand jury testimony but I would not swear to it, that he understood it was a discount of an executive nature.

THE COURT: Well, the time lapse between the theft and the use is short enough so that the jury could infer knowledge, even from that, and I am not going into the other things.

Motion denied.

MR. ROSNER: Very well, your Honor. I do not know if my previously stated apologies to the Court is on the record but I did anticipate the Government would be continuing all day with the three witnesses who they have been looking for.

THE COURT: Can you get your witnesses here this afternoon?

MR. ROSNER: I have not even spoken to one of them. I arranged to meet him at 4:30 this afternoon. I had assumed he would take the whole day on the Government case, your Honor.

I apologize to the Court for the inconvenience not only to the Court but to the Government. I would anticipate, if we started tomorrow at 10:00, I would be completed by 11:00 or 11:15.

THE COURT: We will go right into rebuttal, if there is any and into summations and instructions.

I would suppose if you know the Government has been unable to find any of these witnesses that you cannot argue to the jury that they should be produced. There is not any inference from their not being here.

MR. ROSNER: Frankly, your Honor, I have never been confronted with a situation like this before in my life.

THE COURT: It comes up at an unusual time but it has happened before.

MR. ROSNER: Candidly, I am not sure, at least based on the grand jury testimony that was furnished to me by the Government, I am not sure anything they said would have been admissible, anyway.

THE COURT: All right, we will leave the matter there.

MR. ROSNER: Putting it another way, if I might, based on the grand jury testimony I read, ~~I~~ would have voiced objections to at least large portions to what I understand their testimony was going to be.

THE COURT: You are entitled to object but I guess we will have to adjourn until tomorrow morning at ten o'clock.

MR. ROSNER: I apologize again, your Honor, but I assumed Mr. Cunningham would be able to find these people.

THE COURT: The Government is not as all-powerful as counsel tells juries it is.

Bring in the jury and I will excuse them.

(The jury took its place in the jury box.)

THE COURT: Ladies and gentlemen, I have not been so frustrated in a long time but we have a situation where the Government witnesses we anticipated today are not here and the defendant's witnesses who were anticipated for tomorrow cannot be produced this afternoon. We will have to adjourn again and I think we will complete the case tomorrow and you will get it into your hands tomorrow. Perhaps you should plan to stay a little later than ordinary tomorrow if that may be appropriate, in order to try to reach a decision before the end of the day.

You heard the Government's case. You have not heard what the defendant may produce, and you have not heard the argument. So please keep an open mind, do not talk about the case amongst yourselves, do not talk about it at home and do not talk to anybody in the courtroom. I guess the amount you are paid per day is not so great that having the Government pay you for a short day is a tragedy. We have done all we can today.

Thank you and be here at ten o'clock tomorrow morning.

(The jury left the courtroom.)

MR. ROSNER: Your Honor, I have not received any requested instructions from the Government. I have prepared six requests on behalf of the defendant Alfano, that are limited strictly to what we believe are the elements of the crimes charged in the indictment and I would like to submit them to your Honor.

THE COURT: All right, let me have them.

THE COURT: Mr. Cunningham, I think I had some requests from the Government in the Gallo case. I was planning to use a charge similar to what I gave in that case. I do not think they were anything very special, primarily knowledge and the elements of the crime, and so I will proceed on the basis of what I heard from the Government in prior cases.

MR. CUNNINGHAM: In addition, I would ask for an additional instruction from Gallo, and that is a conscious avoidance charge be given which we did not give in Gallo because of the fact we had 427 tickets being written in his own handwriting.

MR. ROSNER: I move to dismiss this case on the grounds of it being minimus.

THE COURT: The problem in this case is that the defendant if he had these tickets could have given information which he has not given.

MR. ROSNER: Well, your Honor, I would believe at least based on my conversations with the defendant and based on his testimony in the grand jury that he has indicated quite clearly from whom he got those five tickets and those others that he made reference to. I think even the Government telephone tap indicates from whom he got the tickets which is consistent with what he told the Government.

THE COURT: Well, all right, that is neither here nor there. We are at the point of defendant's case and I will hear you tomorrow.

(Whereupon, at 1:00 o'clock p.m. the trial was recessed until 10:00 A.M. the following day.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

against :

LAWRENCE ALFANO, :

Defendant :

---------------------------------x

75 CR 298
74 CR 818

United States Courthouse
Brooklyn, New York

OCTOBER 21, 1975
10:00 a.m.

Before:

HONORABLE ORRIN G. JUDD,
U.S.D.J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MYLES CUNNINGHAM, Esq.
Assistant U.S. Attorney

JONATHAN ROSNER, Esq.
Attorney for Defendant

MS. MARION SELTZER, Esq.
Legal Aid Society
For Witness Michael Argondizzo

MR. ROSNER: Could the record reflect I have returned to Mr. Cunningham Exhibits 3500-1 through 4, grand jury testimony of Messrs. Maltese, Sampogne and Kilgallon.

MR. CUNNINGHAM: Before the witness is called, could we possibly have an offer of proof as to what the witness will testify to.

MR. ROSNER: What witness?

MR. CUNNINGHAM: Doesn't the defense have a witness?

MR. ROSNER: We have witnesses.

MR. CUNNINGHAM: Could we have an offer of proof as to what the witnesses will be testifying to.

MR. ROSNER: That's most unusual. I never understood it was the defense functions to inform the Government of the defense witnesses before the witnesses are called.

THE COURT: Witnesses must wait to get on the stand. I don't see any great harm in it.

MR. ROSNER: I would specifically decline unless your Honor directs me to do so, the Government never even disclosed the witnesses they intended to call.

THE COURT: Put him on the stand. We'll send the jury out of the courtroom.

MR. CUNNINGHAM: One moment, your Honor. One of the witnesses is going to be a young lady by the name of Judy Varisco. I'd be interested to know whether or not she's going to add anything material to the case, No. 1, and anything that's not hearsay to the case, No. 2.

THE COURT: Why don't you wait and see.

MR. ROSNER: I would represent to the Court that based on my meeting with the witness she will add materially to the case insofar as the defendant is concerned. It is also my understanding that the burden of her testimony is or should be well known to the Government, since she was under subpoena by the Government, was interviewed by the Government, both through the services of FBI agents and through Mr. Cunningham and insofar as certain portions of her testimony might be hearsay, I would submit that at that time they will be offered with limiting instructions.

MR. CUNNINGHAM: I think there's going to be testimony given by Ms. Varisco that these were "not stolen tickets," but discount tickets that she had purchased, and in other words, what she thought these tickets were has no bearing on this case and what the defendant told her--

THE COURT: If she's going to testify about other sales from the defendant it may open the door to rebuttal testimony.

MR. ROSNER: I would specifically submit, your Honor, in light of the element of knowledge necessary insofar as proof of the crimes charged in the indictment is concerned, conversations she might have had with the defendant and conversations she might have had with others who are mentioned in the tape that the Government has already offered and has been received in evidence as Exhibits 18 and 19, the question of (a) her state of mind and (b) the defendant's state of mind is most relevant.

THE COURT: I'm not sure her state of mind is. Is she the one who provided the ticket to the defendant?

MR. CUNNINGHAM: No, in fact, she never bought tickets from the defendant.

MR. ROSNER: If she didn't buy tickets from the defendant, I would like to know why the tape, 18 and 19, was received in evidence. What was the purpose of that tape?

MR. CUNNINGHAM: Show the knowledge of the defendant at that time.

MR. ROSNER: Precisely. Therefore her knowledge and her knowledge of the defendant's knowledge is most relevant.

THE COURT: She can testify to what he said.

MR. CUNNINGHAM: She can as to what he told her? Would that not be hearsay, your Honor?

MR. ROSNER: It might very well be hearsay.

What they're trying to do is by indirection, not by direction. They're trying to get testimony and attribute to the defendant--

THE COURT: It's a device used that has sometimes boomeranged.

Let's get her out to see what she will say.

MR. ROSNER: She's not my first witness, your Honor.

MR. CUNNINGHAM: Will you tell us who the first witness will be.

MR. ROSNER: No.

MR. CUNNINGHAM: Can we get a moment or two for 302, unless they call a witness -- for our own benefit, so we don't have to interrupt the trial to send an FBI agent to go through hundreds and hundreds--

THE COURT: Send Mr. Rigolizzo out to get them.

BEST COPY AVAILABLE

There's no reason you shouldn't have them if this witness is going to testify.

MR. CUNNINGHAM: I asked the defense counsel for the name of the witness and he refuses to give me the name, the first witness, your Honor, he will not give me.

THE COURT: Let's get started.

MR. ROSNER: I didn't know the names of any of your witnesses before they took the stand, Mr. Cunningham.

(The jury enters the jury box.)

THE COURT: Good morning, ladies and gentlemen, we're ready to start now.

Mr. Rosner, will you proceed.

MR. ROSNER: Yes, your Honor.

The defense calls Michael Argondizzo.

MICHAEL ARGONDIZZO, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name, and spell it, please.

THE WITNESS: Michael Argondizzo, A-r-g-o-n-d-i-z-z-o.

DIRECT EXAMINATION

BY MR. ROSNER:

Q Mr. Argondizzo, will you please speak in a loud voice so that the members of the jury and the Court and Mr. Cunningham can hear you.

Where do you reside?

A 233 Jamaica Avenue, Brooklyn.

Q Where is that, sir?

A Brooklyn.

Q Have you ever been convicted of a crime?

A Yes, I have.

Q Where, for what, and when?

A First crime was cashing a check in 1966, which I got probation.

The second one was in 1970 for petty larceny, was thrown out, dismissed.

Third one was for conspiracy to hijack, which I did time.

Q When was that?

A I just got out. That was in 1975.

Q Mr. Argondizzo, I show you Government's Exhibit 1 and 2 in evidence (handing to witness), and Government's Exhibit 3, 4, and 5 in evidence and ask you to look at those.

(Pause)

Q Have you seen those five exhibits before?

A Yes, sir.

Argondizzo-direct

Q Can you tell the Court and jury where you first saw those exhibits to the best of your recollection?

A I purchased them from a person to give to Mr. Alfano, to fly.

Q When you say you purchased them, what do you mean?

A I bought them through a man who said he had a travel agency.

Q Do you recall his name?

A His name was Charlie.

Q Do you recall the name of the travel agency?

A No, I don't.

Q How much did you pay for those tickets, if you recall?

A I don't remember the exact amount of each ticket, but it was like twenty-five percent -- the man said they were executive tickets.

Q When you say "the man," whom do you mean?

A The person I purchased them from.

Q When you first saw those tickets, did they have all of the entries with respect to the names, the flight numbers, the validation stamps, on them?

A Yes, sir.

Q Directing your attention to each one of those

Argondizzo-direct

exhibits, 1 through 5, individually, can you tell the Court and jury to whom you delivered each one of those?

A These tickets, who I gave them to?

Q Well, who did you give Exhibit 1 to?

A Mr. Alfano.

Q Who did you give Exhibit 2 to?

A Mr. Alfano.

Q To whom did you give Exhibit No. 3?

A I gave all of them to Mr. Alfano.

Q All to Mr. Alfano?

A Yes.

Q How long have you known Mr. Alfano?

A About three years.

Q When you gave those tickets to Mr. Alfano, did you say anything to him or did he say anything to you?

A I don't--

Q Pardon?

A I don't understand what you mean, sir.

Q Did you have a conversation with him?

A You mean on the tickets?

Q Yes.

A Yes.

Q Could you repeat for the Court and jury what that conversation was?

Argondizzo-direct

MR. CUNNINGHAM: Objection, to any conversation as to the defendant as being hearsay.

THE COURT: It relates to his knowledge, and I think it has a bearing on the case. I'll overrule the objection.

MR. ROSNER: We would consent to a limiting instruction. His testimony is offered not to prove the truth of what was said between the parties, but to prove that it was said.

THE COURT: It's received as bearing on the knowledge that Mr. Alfano may have had at the time that he bought these tickets.

Q Would you repeat the conversation for the Court and jury, please.

A I don't understand exactly, you know, what was said, because it was like two years ago.

Q Give your best recollection.

A I told him at the time I gave him his tickets, I heard him saying that he wanted to go to Florida. I told him I knew a person that had a travel agency and I called him up. The guy came down, gave the tickets, told us they were executive tickets from the airport, the airport was putting out a promotion and they could give us twenty-five percent off the tickets.

Argondizzo-direct

Q Did you receive any money from Mr. Alfano when you gave him those tickets?

A He paid me.

Q How much did he pay you?

A I don't remember, sir, whatever the amount was at the time.

Q You say whatever the amount was. Tickets, Exhibits No. 1 and 2, say $170 and change. Is that what Mr. Alfano gave you?

A Twenty-five percent less.

Q Then yow about Exhibit 3, 4 and 5?

A Same thing.

Q Same thing?

A Yes.

Q I ask you to look at Exhibits 3, 4 and 5 and ask you if you know anybody whose name appears on those tickets.

A I met the person, was a friend of Mr. Alfano's.

Q Who was that, sir?

A A man named Steve Maltese.

Q Do you know a gentleman named Dannie or Daniel Kilgallon?

A Yes, I met him once.

Q Can you tell us where and when you met him?

Argondizzo-direct

A Mr. Alfano works.

Q Pardon?

A Where Mr. Alfano works.

Q Was Mr. Alfano present when you met him?

A Yes.

Q Did you have any conversation with Mr. Kilgallon?

A I can't remember, sir.

Q Did you give Mr. Kilgallon anything? Just yes or no.

A No.

Q You didn't.

Do you know a lady named Judy, who works at Mr. Lucky's Bar?

A Yes.

Q When did you first meet her?

A When I delivered the ticket to her.

Q Pardon?

A When I delivered the ticket to her.

Q Where was that?

A Mr. Lucky's Lounge.

THE COURT: Where?

THE WITNESS: It's the bar on Cypress Avenue, sir. I think it was Mr. Lucky's.

THE COURT: Very well.

Argondizzo-direct

Q Did she pay you for those tickets?

A Yes.

Q Do you know where those tickets were, or a flight to?

A I can't remember, sir.

Q Mr. Argondizzo, did you ever have occasion to return any tickets to either a travel agent or airline?

A Yes, sir.

Q How many times?

A Once, sir.

Q When, where and under what circumstances?

A Well, I bought a ticket for a person--

MR. CUNNINGHAM: I'm going to object as to the relevancy of this, your Honor.

THE COURT: Let's come to the side bar.

(The following occurred at side bar.)

MR. CUNNINGHAM: Your Honor, in one breath the nam says all these tickets from a man named Charlie who was a travel agent. It now turns out these tickets were stolen tickets. In the next breath he says occasion when he's made refund to travel agencies. What does that have to do, No. 1--

THE COURT: What do you expect to prove here?

MR. ROSNER: I think Mr. Cunningham misconceives what the witness is testifying to. I asked whether he ever returned any of the tickets to either an airline or travel agent.

THE COURT: These five tickets?

MR. ROSNER: Not these five tickets. The Government has offered substantial proof in support of its case that if the tickets were returned for a refund it would have turned out on the black list. They offered that proof through the testimony of Mr. Sciata, through the testimony of Mr. Zackaroff, and through their exhibits. I think I'm entitled to rebut that.

MR. CUNNINGHAM: The problem is if this testimony this man is to be believed, he got a ticket from a man that owned a travel agency. There's no testimony nor can this man testify every ticket he got from that source could have come from the Wings & Wheels shipment.

THE COURT: It's a possible inference. When are we going to finish the case now?

MR. ROSNER: I have another two or three witnesses on this witness.

THE COURT: You have opened up a hornet's nest, it seems to me.

Argondizzo-direct

(The following occurred in open court.)

MR. ROSNER: Could I ask the Court Reporter to read the last question of the witness.

(Record read)

Q Did you understand the question?

A Yes.

Q Please answer it.

A We ordered the ticket -- Harry --

Q When, where and under what circumstances did you return tickets to a travel agency, is the question.

A I didn't return them to a travel agency, your Honor. I returned them to the airport.

Q The airport?

A Yes.

Q Do you remember what airline?

A I don't remember if it was National or Eastern.

Q When was it?

A In the summer of -- It was in the summer of '73, I think.

Q Can you tell the Court and jury what happened?

A I went to the airport, I asked them if I could return this ticket, and they asked me if my name was on the ticket. They said no, they would have to mail the refund check to the person that was on the ticket; they had the name. I gave them the address and they mailed the refund check to the person.

Q Did you ever see the refund check?

A Yes.

Q Did you ever receive the refund check?

A Did I receive it? Well, I seen it came back, the money that was cashed, a woman cashed it.

Q This ticket that you testified you returned either to National or Eastern, were thewe also tickets you received from the man you identified as Charliet?

A Yes, sir.

Q Have you ever been charged with possession of stolen airline tickets?

A No, sir.

MR. ROSNER: No further questions.

THE COURT: Are you ready, or do you want a recess?

MR. CUNNINGHAM: I would like to ask a question and possibly have a recess to go over the material.

CROSS EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Argondizzo, you were fortunate-- Did you consider yourself fortunate to get that refund check in the mail?

Argondizzo-cross

A Pardon me?

Q Did you consider yourself fortunate to receive that refund check in the mail?

A Fortunate?

Q Yes.

A I don't understand what you mean by fortunate.

Q Did you anticipate receiving that check in the mail?

A Why not, sir? It's supposed to be honest tickets.

Q Was anything wrong with that ticket when you surrendered it?

A No, sir.

Q Do you know today if there was anything wrong with that ticket?

A No, sir.

Q That could have been a perfectly valid ticket that you surrendered, got from this man Charlie?

A Yes, sir.

Q Speaking about this man Charlie for a moment, where is this travel agency located?

A Manhattan somewheres, sir.

Q Whereabouts?

A I don't remember, sir.

Q You don't remember?

A No, sir.

Q Did you ever know where it was?

A Did I ever?

Q Did you ever know where the travel agency was located?

A When I saw the card, sir.

Q Excuse me?

A When I saw the card, an address on the card.

Q What card?

A Travel agency card that he gave us.

Q I'm sorry, what do you mean by travel agency card?

A Every time I purchased a ticket, they delivered had the card and everything in the folder.

Q You never went to see him personally at his travel agency?

A No, sir.

Q Approximately how many tickets did you buy from him?

A Maybe ten or fifteen, sir.

Q Ten or fifteen?

A Yes, sir.

Q Any chance you could have bought more than that from him?

A Pardon?

Q Any chance you bought more from him?

A Maybe. I don't remember offhand.

Q Did you ever buy any airline tickets from anybody else?

A No, sir.

Q Have you ever written any airline tickets yourself?

A No, sir.

Q You've never written any airline tickets?

A No, sir.

Q Are you sure you never purchased any airline tickets from anybody else?

A Am I sure, sir?

Q Yes.

A As far as I remember, no, sir.

Q Do you know a man by the name of Steve Perna?

A No, sir.

THE COURT: What was the answer? I didn't hear the answer.

MR. CUNNINGHAM: "No, sir," I believe he answered in the negative.

MR. CUNNINGHAM: Might I have this marked for identification, please.

THE COURT: Wait a minute. You say the answer was he knows him but the answer is negative.

MR. CUNNINGHAM: Let me repeat the question.

Q Do you know a man by the name of Steven Perna?

A No, sir.

MR. CUNNINGHAM: Might I have this marked for identification, please.

THE CLERK: Photograph marked Government's Exhibit 26 for identification.

(So marked)

MR. ROSNER: Might we approach the bench.

THE COURT: Yes.

(The following occurred at side bar.)

MR. ROSNER: Your Honor, the document marked as an exhibit is obviously a mug shot. I just wanted to note my objection.

THE COURT: Overruled.

(The following occurred in open court.)

Q Did you ever know a man by the name of Steve the Hawk?

A Yes, sir.

Q Do you know what Steve the Hawk's last name would be?

A No, sir.

Q I show you Government's Exhibit 26 for identification and ask you if you know that gentleman.

A Yes, sir.

Q Can you tell us who that is?

A Steve.

Q Is that the man you know as Steve the Hawk?

A Yes, sir.

Q Have you ever bought any airline tickets from him?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q Sir, do you ever recall being interviewed by Michael Rigolizzo, Federal Bureau of Investigation?

A Yes, sir.

Q Do you know whether or not Mr. Rigolizzo ever asked you any questions about knowing Steve the Hawk?

A Yes, sir.

Q Excuse me?

A Yes, sir.

Q Did you tell him that you knew Steve the Hawk?

A Yes, sir.

Argondizzo-cross

Q Did you ever tell him you bought any airline tickets from him?

A No, sir.

Q You're quite sure of that?

A Yes, sir.

Q Do you know a man by the name of Wally Cascio?

A Yes, sir.

Q Did you ever sell any tickets to Mr. Wally Cascio?

A No, sir.

Q Did you ever work for a tobacco company?

A Yes, sir.

Q How long did you work for a tobacco company?

A About eight months, seven months.

Q Did the owner of this tobacco company, did he ever have any airline tickets, blank airline tickets, in his drawer?

A I don't know, sir.

Q Did you ever fill any of those airline tickets out?

A No, sir.

Q Did you ever tell Mr. Rigolizzo you filled out approximately twenty of those airline tickets?

A I don't remember, sir.

Q Did you ever have any conversatons with Mr. Rigolizzo as to whether or not any of these airline tickets were ever stolen, that you knew they were stolen?

A No, sir.

Q You never did?

A No, sir.

MR. CUNNINGHAM: Might we have a side bar for a moment.

THE COURT: Yes.

(The following occurred at side bar.)

MR. CUNNINGHAM: Your Honor, on August 22, '74, Mr. Argondizzo was interviewed at length by Agent Rigolizzo. Apparently his entire story now has changed as to what he told Agent Rigolizzo. I would like to have a little bit of time, if I could, to digest this. This is the first time I actually am familiar with it.

THE COURT: Yes.

MR. CUNNINGHAM: To give you a brief idea, "He stated that approximately one and one-half to two years ago he was working for a tobacco company, and while employed, had stolen approximately fifteen company airline tickets, ten of which he sold to Wally Cascio. He stated that he wrote out two of the fifteen tickets himself. He called up the airline and told them that his boss had left the ticket on his desk for him to use, but had forgotten to write it out. The airline then explained to him how to write out the ticket, which he did."

MR. ROSNER: Mr. Cunningham has just read to the Court an interview by the FBI agent, that inquiry concerning those ten to fifteen airline tickets of this witness, apparently told Mr. Rigolizzo he previously had written out are unrelated to this case; they're airline tickets, according to the FBI interview, that were stolen, not from the airlines but apparently from a company for whom he worked. As such, No. 1, in my opinion it is a collateral matter on which extrinsic evidence is not admissible. Anything in support of an independent claim which is not connected with the defendant and, No. 3, it is a crime mostly connected, at least in factual circumstances, although not in terms of this batch of tickets moving in interstate commerce, it would be prejudicial for any extrinsic evidence, to cross-examine in terms of prior inconsistent statements if it's specified they are not the tickets that are part of the group stolen here. I'm afraid that if Mr. Cunningham does do this, that this witness is involved in the overall situation--

THE COURT: It all goes to credibility. I'll permit the cross-examination.

We'll take a short recess.

(The following occurred in open court.)

THE COURT: We'll take a short recess, ladies and gentlemen. Go back to the jury room maybe ten or fifteen minutes. If somebody wants to go down to get coffee, you can do that, but be back in ten minutes.

Don't talk. Figure on resuming at a quarter to eleven.

(The jury leaves the courtroom.)

(Recess)

THE COURT: Are you ready to go ahead?

MR. CUNNINGHAM: Yes.

THE COURT: Bring in the jury, please.

Where is Mr. Argondizzo?

MR. ROSNER: He's in the jury room, your Honor.

(The jury enters the jury box.)

(The witness resumed the stand.)

THE COURT: You may be seated. You're still under oath.

CROSS EXAMINATION (CONTINUED)

BY MR. CUNNINGHAM:

Q Mr. Argondizzo, you went over this testimony that hou gave here this morning with counsel, didn't you?

A Pardon me, sir.

Q Didn't you talk to the defense counsel yesterday about this?

A Did I talk to him about the case?

Q Yes.

A No, sir.

Q You didn't talk to defense counsel about the case; is that right?

A I saw him yesterday, sir--

Q Didn't talk to him about the case?

A Only about my testimony.

Q Only about your testimony?

A Testimony.

Q What kind of testimony did you talk about?

A About what I had said in the grand jury.

Q About what you said in the grand jury?

A Yes.

Q Did you read your testimony that you gave in the grand jury?

Q Yes, sir.

Q That's basically what you testified about this morning; isn't that right, sir?

A Yes, sir.

Q Do you remember when you testified before the grand jury?

A No, sir.

Q Would it refresh your recollection if I told you you testified before the grand jury on February 21, 1974?

A Yes, sir.

MR. CUNNINGHAM: Might I have this marked as a Government exhibit, please.

THE CLERK: Transcript marked Government Exhibit 27 for identification.

(So marked)

THE WITNESS: Might I ask you a question?

THE COURT: Yes.

THE WITNESS: If I wanted not to say any more, have counsel present, can I do so?

THE COURT: Yes, you may.

Q Isn't it true, sir, after February 21, 1974, you later voluntarily appeared at the offices of the Federal Bureau of Investigation on August 22 of 1974, some six months later?

A I refuse to answer.

Q Excuse me?

THE COURT: The witness asked me whether he could request the presence of counsel before he answers further questions. He has that right since there may be a possibility -- he has a right not to answer for an answer that may tend to incriminate him.

THE WITNESS: Yes, sir.

THE COURT: Let me ask you, have you been represented by counsel?

THE WITNESS: No, sir.

THE COURT: We'll have to take a shor recess.

The jury is to go back to the jury room.

Please do not talk about the case.

(The jury leaves the courtroom.)

THE COURT: I don't know whether you're eliginle for Legal Aid or whether you want to hire an attorney for your own.

THE WITNESS: I need Legal Aid, your Honor.

THE COURT: You're under oath still.

Let me ask you these questions.

BY THE COURT:

Q Are you employed?

A No, sir, I just got out of jail.

Q Do you have any money?

A No, your Honor.

Q Do you own any property?

A No, sir.

Q Do you want a lawyer before you answer any further questions?

A Yes, sir.

THE COURT: Will you call Legal Aid to see if they can get somebody over here right away.

THE CLERK: Yes, your Honor.

THE COURT: We can't put outside calls from the courtroom. If there's somebody in the building, somebody might come up soon. If not, we may have to have a longer time. Just wait here until we get a report from Mr. Giokas.

MR. CUNNINGHAM: In response to the questions you just asked the defendant, as to his financial resources, could you possibly also ask the defendant whether or not his wife opened up a clothing store in Howard Beach, Long Island.

THE WITNESS: No, sir, she does not own the clothing store, she works for somebody.

THE CLERK: Somebody is on the way over.

THE COURT: From Court Street?

THE CLERK: Yes.

THE COURT: We'll take another fifteen-minute recess.

Mr. Argondizzo, you ought to sit in counsel room across the hall, not talk to anybody in the meantime.

THE WITNESS: Yes, your Honor.

THE COURT: Wait until they come so they can talk to Mr. Argondizzo.

THE CLERK: Yes, your Honor.

THE COURT: There'll be a fifteen-minute recess now.

(Recess)

THE COURT: Good morning, Ms. Seltzer. Thank you for coming over promptly.

MS. SELTZER: You're welcome.

THE COURT: Mr. Argondizzo, come back to the witness stand.

(The witness resumes the stand.)

MS. SELTZER: It's Mr. Argondizzo's position this entire line of questioning possibly could lead to some kind of testimony on his part which would be indicative of some criminal involvement; therefore it's his intention at this point to plead the Fifth, his rights under the Fifth Amendment to any and all questions Mr. Cunningham is going to ask. He doesn't mean any disrespect to the Court.

THE COURT: He's entitled to legal counsel. I'm not sure to what extent he has waived his Fifth Amendment privilege by testifying thus far. What do you know on that?

MS. SELTZER: I was just called into this case. It seems to me he has not had counsel up until this point, and if what he has done is because of ignorance or because of lack of an attorney, because of lack of knowledge that he should have requested an attorney, that it should not be counted as any kind of waiver of any rights. He certainly didn't knowingly waive any rights.

THE COURT: What do you have to say?

MR. CUNNINGHAM: This is the same story that we had with Mr. Alfano when he appeared before the grand jury. I would quote to the Court the very end of the testimony, reading from page 53 of his grand jury testimony.

MR. ROSNER: Whose?

MR. CUNNINGHAM: Mr. Argondizzo's grand jury "Question: How about Dickie?

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"Answer: I know a J. Messina.

"Question: What business is he in?

"Answer: Catering business.

"Question: Is there anything else you know about airline tickets at all that you can help us in this particular investigation?

"Answer: I have to stand on the Fifth on that.

"Question: You have to stand on the Fifth on that?

"Answer: Yes, sir.

"Question: Well--

"Answer: That will hurt me. I said it would hurt me, incriminate me.

"Question: Have you spoken to an attorney on this?

"Answer: No, sir.

"Question: You haven't spoken to an attorney on this?

"Answer: No, sir."

The witness is well aware of his rights of waiver and rights of the Fifth Amendment, also, when considered--

THE COURT: Was he warned in the grand jury that testimony might be used against him?

MR. CUNNINGHAM: Yes, your Honor, on page 2 and 3 there was exclusive -- excuse me -- extensive warnings of his rights to counsel.

MR. ROSNER: I might, just to complete the record in that regard for the Court's benefit, indicate to the Court that what Mr. Cunningham read is accurate, but on the following page, on page 54, the Assistant who was questioning Mr. Argondizzo indicated that there might have been a waiver, then suggesting that Mr. Argondizzo might wish to consult with counsel, quoting from the grand jury testimony: "In the meantime you may wish to consult with counsel, but as I say there's a good possibility you may have waived your Fifth Amendment rights and you were apprised of your rights before you started. I think at this time the most advantageous thing to do would be to give you an opportunity to consult with counsel. I would ask the foreman to order you to appear when notified and no further subpoena will be served upon you."

Apparently he was not called back.

THE COURT: Is that right?

MR. CUNNINGHAM: That's right, your Honor.

THE COURT: What's your position on this situation, Mr. Rosner?

MR. ROSNER: One of surprise and shock as I heard the testimony coming out.

Second of all, your Honor, at least based upon what Mr. Cunningham read at the side bar conference, I would suggest that assuming the witness testified as Mr. Cunningham indicated he had previously stated to the FBI, that is that he was involved in filling out airline tickets that were stolen from a company he had previously worked for, that evidence, as I indicated at the side bar is unrelated, as I understand it, to any of the tickets, the total of which--

THE COURT: It goes to credibility, therefore it's admissible.

MR. ROSNER: I would agree with your Honor, but suggest that perhaps the government is bound by the witness's answer in terms of anticipating--

THE COURT: That's another issue. Right now I'm on the question whether I should direct the witness to answer in spite of the Fifth Amendment claim.

MR. ROSNER: I don't know. I'm not privy to what the Government had by way of material of cross-examine.

THE COURT: You do have the grand jury testimony?

MR. ROSNER: Yes, I d[illegible] Honor, but that did not relate to the testim[illegible]ncerning which the witness invoked his privilege with respect to these other ten or fifteen tickets. I don't know when that occurred. It may well be that occurred at a time sufficiently remote that the witness has a statute of limitations defense. I don't know.

THE COURT: Five years.

MR. ROSNER: I don't know when that happened, as I say.

MR. CUNNINGHAM: Your Honor, by way of background on this matter, I think the Court should be aware of the fact that the reason Mr. Argondizzo did not again appear before the grand jury, at least to the best of my knowledge, is that he voluntarily appeared at the FBI Headquarters out in John F. Kennedy Airport and in front of Agent Rigolizzo and three other special agents of the FBI gave a 7-page story of where these tickets came from, what their origin was, other various tickets, other crimes and more or less made a fairly clean breast of what was

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being said, which completely contradicts the testimony he gave here this morning, but does completely substantiate the testimony in his grand jury testimony. It appears he saw the grand jury testimony yesterday and sought to recite that for the pleasure of the Court this morning.

THE COURT: 1623(d) is always a puzzler. It says, "Where in the same continuous court or grand jury proceeding in which a declaration is made, a person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if at the time the admission is made the declaration has not substantially affected the proceeding or it has not become manifest that such falsity has been or will be exposed."

I'm not sure now that applies here. Maybe we should take a few minutes to look into the question of waiver.

What is your position on his answering questions, Mr. Rosner? That I should direct him to answer?

MR. ROSNER: Your Honor, I can't take a position on that. I don't represent the witness.

Argondizzo-cross

I was surprised--

THE COURT: You have a position as to what the law is affecting a question asked on cross-examination. I don't know how we could strike out the testimony of this witness.

MR. ROSNER: That's the other proble--

THE COURT: If he doesn't answer further questions.

MR. ROSNER: That's the problem I was going to advert to first. Perhaps I should advert to that last.

THE COURT: I think we should.

MR. ROSNER: Were I the witness's attorney, if I can try to be objective in that regard, I would posit the witness has not waived his rights, In fact, what has been asked so far, I think would be regarded as preliminary to the specific questions because the specific questions have not yet been put.

I think the record indicates so far queries as to putting names on tickets. The witness might very well have believed, as indeed, until the side bar conference I believed, that the Government was questioning about ten or fifteen tickets of the batch that were supposed to go to Greenwald in

Bayonne. I assumed that's where the Government was going, which shocked me. Then when we got to side bar, Mr. Cunningham indicated this was not from the Greenwald or Bayonne batch, but rather from tickets taken, presumably, from the witness's former employer.

I had to shift my thinking. I don't know what the witness--

MR. CUNNINGHAM: If I can clarify that line of questioning: On direct examination the witness was asked by Mr. Rosner as to how many tickets did he ever supply for anybody, or how many tickets did you ever write.

He said approximately twenty.

On cross-examination, I asked him how many tickets he had done--

MR. ROSNER: If I might correct you, Mr. Cunningham, I have a specific recollection as to what I covered on my direct. I don't believe I ever asked him how many. I asked him about the five that are in evidence. I asked him whether he ever delivered anything to Mr. Kilgallon, and his response was no.

I asked him to whom he delivered the five

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there. He said Mr. Alfano.

I asked him whether he knew Mr. Maltese.

I asked him whether he ever delivered any tickets to a Judy from Mr. Lucky's bar. Never asked him how many tickets he delivered in all.

You asked him on cross-examination.

MR. CUNNINGHAM: There was reference in the testimony as to how many tickets he supplied to Mr. Alfano. The ticket he said there was twenty, which substantiates the tickets that was in his grand jury testimony, which is completely an opposite to what was said in the 302.

MS. SELTZER: Excuse me. As Mr. Argondizzo's attorney, it seems to me I should have a little more familiarity with what's going on. I feel incompetent here. I don't know what the testimony was. I have spoken to my client for five or ten minutes. I don't feel right about this. This whole discussion. There's no way I could have known what the testimony was, no way I could know what his previous testimony was.

THE COURT: I don't know if you had time to read his grand jury testimony.

MS. SELTZER: I don't know what's going on.

THE COURT: Yes.

I would like to take ten minutes to take a quick rundown on what is the extent of waiver of the Fifth Amendment. Mrs. Seltzer wants to look down in the library, I assume, at the same time.

MR. ROSNER: If I can talk off the top of my head, your Honor?

THE COURT: Yes.

MR. ROSNER: I don't think his grand jury testimony constitutes a waiver at any subsequent proceeding. On that I think the law is clear.

MR. CUNNINGHAM: No problem.

THE COURT: Testimony this morning?

MR. ROSNER: His testimony this morning, might, in my judgment, be construed as a waiver if the Court can ascertain that it was a knowing and voluntary waiver, which any waiver of constitutional rights has to be.

THE COURT: Yes. It may be different when there's a waiver for the defense than when you're testifying for the Government.

MR. ROSNER: I think, your Honor, in that regard, perhaps one of the things that the Court has to consider, if it reaches the issue of knowing and voluntary waiver is (a) an examination of the witness's testimony on direct to determine the scope of direct, and my recollection, as I indicated, is quite clear that I did not ask him how many tickets he delivered to Mr. Alfano.

No. 2, specifically, the questions that were asked in respect of putting handwriting on other tickets, because it seems to me, as I outlined it before, if the witness's mental convolutions were as mine were at the time I was hearing the cross-examination, I assumed that Mr. Cunningham was asking about the tickets that are the total of those which this case involves, only five.

THE COURT: Let me take a ten-minute recess. I'm going to see what I can find with respect to waiver by testifying for the defendant on direct. I think we'd better have Mr. Argondizzo go back to the counsel room and just wait and we won't need you when we discuss it.

MR. ROSNER: Any objection to giving the witness's counsel my copy of the grand jury minutes?

THE COURT: She should look at them.

MS. SELTZER: I guess there's no way I can have a copy of his testimony this morning. I don't know what he said. How can I decide?

THE COURT: My notes of what he said on direct examination are that he had two convictions, one for cashing checks in 1966 and one for conspiracy to hijack in 1975. I believe it was before 1975 because he said he just got out of prison;

That he bought these five tickets to give to Mr. Alfano from a person whose name is Charlie, who he said had a ticket agency, travel agency, whose address and name he didn't know;

That they were twenty-five percent off, and the man said they were executive tickets and they were all filled out;

That he gave them all to Mr. Alfano, whom he had known for three years;

The man from whom he bought the tickets, he said the airline was putting out promotion, and he could get twenty-five percent off. He doesn't remember the amount paid except that that was it, and he met Steve Maltese, who is the witness whom the Government subpoenaed and who disappeared after I had arranged for a physical examination last Friday at the hospital, and he knows Kilgallon, who is another witness whom the Government subpoenaed and whom the

Government subpoenaed and whom the FBI has not been able to find;

That he met Kilgallon where the defendant works;

That he never gave Kilgallon any tickets;

That he knows Judy, who is the defendant's next proposed witness, from Lucky's bar, and he gave a ticket to her at the bar on Cypress Avenue, and she paid. He doesn't know where she was flying, and once he took the ticket back to the airport, to National or Eastern in the summer of '73 and gave the name of the person on the ticket and the refund check was mailed.

There were also tickets from Charlie, and he hasn't been charged with possession of stolen airline tickets.

That came at the beginning of Mr. Cunningham's cross-examination.

We'll have to take a few more minutes, ten minutes.

MR. ROSNER: Is there a library available?

THE COURT: You're a member of the bar. You're entitled to use the fourth floor library here.

MS. SELTZER: What was the question you were reading from?

THE COURT: 1623, the one on the perjury statute.

(Recess)

(Witness not present)

THE COURT: First of all, I'll hear what counsel has to say. Have you any light on it, Ms. Seltzer?

MS. SELTZER: No, it's just my opinion that he has not, by the questions and answers that you have read, he has not waived any rights.

THE COURT: Mr. Cunningham, have you anything on it?

MR. CUNNINGHAM: I think the law, in the short period of time I have been able to look at it, as long as we can show there's a knowing waiver, the fact he was testifying here voluntarily for the defense and the fact he's a friend or associate of the defendant, would tend to show it was a knowing waiver, and he definitely appeared here voluntarily, would go to show a waiver, and as far as the scope of the privilege, I think he still has the privilege to refuse to answer questions on the basis of self incrimination as to matters not covered in the direct, on his direct testimony: however, as to matters that he testified to on direct relating to airline tickets that he got from this guy Charlie and from -- well, I think it's directly relevant, he must be compelled to answer questions.

THE COURT: Mr. Rosner, any comments?

MR. ROSNER: I tend to agree with Mr. Cunningham. I didn't have too much time to do research. I found one case, 492 F.2d 1367. It's not a Second Circuit case.

My recollection of looking at it quickly, when your Honor called the library, was that it was U.S. v. Stevens, but I wouldn't swear to it. It seemed to indicate, and 492 would be a fairly recent case, it seemed to indicate as to matters concerning what the defendant testified to on direct there was a waiver.

I would add, incidentally, that the witness appeared today pursuant to a subpoena I served on him yesterday; to the extent that that has a bearing on it, I think it should be in the record.

I get back to an observation--

THE COURT: You told me yesterday that you couldn't have your witness here yesterday afternoon, that you were meeting one of them at 4:30. I don't know whether this is the one you met or not.

MR. ROSNER: It is, your Honor.

THE COURT: What's the page on 492?

MR. ROSNER: 1367, your Honor, but I won't swear to it.

THE COURT: That related to a Government witness who invoked his privilege as to what was called an entirely unrelated trip.

MR. ROSNER: Precisely, your Honor, and that's in part what I was saying, I agree in part with Mr. Cunningham, the problem, at least as it was initially presented to the Court by this witness, is that the cross-examination as to which he has at least initially invoked his privilege, related to tickets other than the Greenwald and Bayonee travel agency tickets and therefore it was unrelated to his direct examination. Indeed, I can make the argument anything other than the tickets he delivered to Alfano or Judy, go beyond the scope of the direct.

MR. CUNNINGHAM: That was the question I brought up at side bar when we asked about his getting a refund on airline tickets. Mr. Rosner seemed to think that was directly relevant to the case--

MR. ROSNER: Bayonee and Greenwald tickets.

MR. CUNNINGHAM: He said they were not.

THE COURT: He didn't say so.

MR. ROSNER: Said they were the tickets he got from Charlie.

THE COURT: The cases I found are one in the Supreme Court, McCarthy v. Arndstein, 262 U.S. 355, and 53 Sup.Ct. 562, which says that "Where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of a privilege of stopping short in his testimony whenever it may fairly tend to incriminate him."

Here the testimony on direct was not an actual admission of guilt. It might be considered an admission of incriminating facts and the advice given by Walter Hoffman in Glotzbach v. Clavens would be 96 F.Supp 685, is that factually the matter rests entirely within the Court.

There he found the witness had waived his privilege because of the extent of information that he had given. That was an IRS case.

The Third Circuit in U.S. v. Toner, 173 F.2d 150, said the privilege can be waived. The problem of waiver may become difficult, but there is no waiver here, and since the question on direct examination did not incriminate him, he can exercise his privilege when the occasion arose.

There is also the point which Ms. Seltzer raised about whether we have a knowing and intelligent waiver, and I think where a witness, even though he has been in court a couple of times -- twice with adverse results, once with not -- where he's not advised by counsel beforehand and not knowing the name of the witness or what it would be, he did not think to advise him beforehand, a waiver should not be broadly construed.

I'm inclined to think therefore that the privilege can be exercised as to any but the Charlie tickets and the refund ticket.

I think he has waived it as to other matters. I don't know what breadth that gives to Mr. Cunningham's cross-examination.

MR. ROSNER: That presents another problem to me, quite frankly.

THE COURT: What's your problem?

MR. ROSNER: I don't know what Mr. Cunningham has in the 302 that he was using for cross-examination purposes other than what he indicated at the side bar after the question was asked and privilege was invoked.

It is apparent the question intended to be asked if not asked in haec verba was tickets unrelated to Greenwald, Bayonee-Charlie-Alfano tickets. The question came out and as the jury heard it leaves the fair inference, at least, that he was writing, up the Bayonee-Greenwald-Charlie-Alfano tickets.

The question didn't include the reference to the theft from the tobacco company, which really apparently what it was--

THE COURT: That's the point where he exercised his privilege.

MR. ROSNER: My problem, if he insists in his invocation, I cannot clarify for the jury the fact that those tickets that he allegedly completed himself in his own handwriting are not involved in this case.

The implication now is that he completed tickets that were involved in this case.

THE COURT: I'm not sure which implication it is. The implication is that maybe he completed so many tickets himself he's afraid of risking incrimination.

MR. ROSNER: The only information Mr. Cunningham has is that the tickets that he completed that were stolen from the tobacco company employment.

MR. CUNNINGHAM: Those are the ones we know he himself completed.

MR. ROSNER: Those are unrelated to this case.

That's my point.

MR. CUNNINGHAM: That's correct, your Honor.

MR. ROSNER: The way the record stands now, the implication that he completed tickets with respect to that case, I can't cure that implication, and if your Honor sustains it--

MR. CUNNINGHAM: I asked him specifically whether or not he ever completed, filled out those tickets.

MR. ROSNER: Any tickets.

MR. CUNNINGHAM: That can be cured by an instruction by the Court.

MR. ROSNER: It is, as my evidence professor said, like trying to unring a bell.

THE COURT: It's best to make no comment on it. What questions are you going to put if I limit the scope this way, Mr. Cunningham?

MR. CUNNINGHAM: I'm going to ask him about a Mike Loria, who is the man that he claims introduced him to this Charlie, last name unknown, with the travel agency. I'm going to ask him--

THE COURT: He didn't say he was-- He didn't say on direct that he was introduced by Mr. Loria.

MR. CUNNINGHAM: No, your Honor, he said he got these tickets from a man named Charlie who had a travel agency which he had never visited but he would find out about it by telephone.

The Government should be able to inquire how he met this man.

THE COURT: That I think he can do.

MR. CUNNINGHAM: This Charlie.

MS. SELTZER: Your Honor, I'm a little confused as to what these questions have to do with the direct testimony.

THE COURT: His testimony was that he got the tickets from Charlie and Charlie had a travel agency and the question is whether he really believed Charlie had a travel agency.

MS. SELTZER: What is this person, Mike Loria have to do with Charlie?

MR. CUNNINGHAM: Introduced him to Charlie.

MS. SELTZER: How does one know that? That wasn't testified to. Am I correct that there was no testimony to that effect?

MR. ROSNER: I think Mr. Cunningham's point is, if I can be the devil's advocate -- you'll forgive me as referring to you as the devil -- Mr. Cunningham's point is that since he has testified he got the tickets from Charlie he was led to understand to own a travel agency, he can inquire as to how he met Charlie.

THE COURT: Yes.

MS. SELTZER: If he refuses to testify, what's your Honor's ruling going to be on the grounds that it may incriminate him?

THE COURT: I'll direct him to answer. If he doesn't answer, I don't know what I'll do.

MS. SELTZER: I think he won't.

At this time I'll advise the Court in addition to the items involved with these tickets, there's a lot of allegations of possible perjury involved here. Even if the possibility of committing perjury--therefore incriminating himself, because of conflicting statements that were made at various times, it may be in his best interests not to testify.

THE COURT: I don't think that can prevent inquiry into what he's already said.

MS. SELTZER: If he's made two conflicting statements -- I'm not sure that he has -- but I understand that there are certain statements that were made at one time that are different from the statements apparently made before the grand jury, and if his being asked that question a third time would be relevant as to the veracity of one or another of his statements, then it seems to me that it would be -- it would be in, in effect, incriminating him; at least on a perjury charge.

It's my understanding from Mr. Cunningham, Mr. Cunningham doesn't believe the statements made before the grand jury; does not think -- it's been mentioned -- it's been mentioned to me a possible perjury.

MR. CUNNINGHAM: The testimony of Mr. Argondizzo before the grand jury was not completely candid, let's put it that way, your Honor. What he tried to do, tell as many half truths as he thought he could and to leave out as much testimony as he thought he could.

THE COURT: Wait a minute. What else do you want to ask about?

MR. CUNNINGHAM: A man by the name of Steve, who from reading this 302, I would take that back on Mr. Loria. Apparently this man, Steve, last name unknown, is the man that introduced him.

MR. ROSNER: It's consistent with my recollection--

MR. CUNNINGHAM: Right. Also picking up the tickets from Mike Loria.

THE COURT: As well as Charlie.

MR. CUNNINGHAM: Yes, sir.

THE COURT: He testified on direct only about Charlie.

MR. CUNNINGHAM: Now he said he picked them up from Steve or Mike Loria or from Charlie.

THE COURT: Ms. Seltzer says it gets a little difficult to separate out what's covered by the waiver and what runs risk. Does that really cover it or are there other questions?

MS. SELTZER: I would object, by the way, your Honor, in ruling in favor of Mr. Cunningham being permitted to ask these questions.

MR. CUNNINGHAM: Also a statement here, your Honor, which I'll read to the Court: "He estimated that he obtained over one hundred airline tickets from Steve. He advised that Larry Alfano of the Crossroads Bar, Metropolitan Avenue, and himself would take orders for airline tickets, put up the money to buy the tickets from Steve and thereafter sell and deliver the tickets to the passengers."

THE COURT: He testified about what he told Mr. Alfano, so I think other things that he told Mr. Alfano are the subjects of a waiver.

MR. CUNNINGHAM: I think we can go into the state of mind of the defendant when he was selling these tickets whether he himself knew these tickets to have been stolen.

MR. ROSNER: It's going to be difficult to do unless you do it by osmosis.

MR. CUNNINGHAM: I can ask him the question.

THE COURT: You're getting out of his own state of mind. I don't think he can do it.

MR. CUNNINGHAM: They then asked deep down inside, were his inner feelings he knew they were not legitimate, probably some sort of swag.

MR. ROSNER: Are you going to ask that, Mr. Cunningham?

MR. CUNNINGHAM: He further stated, approximately the last twenty tickets he knew were stolen but he needed the money. But he did not know they were stolen.

MR. ROSNER: That they were not stolen.

MR. CUNNINGHAM: He did know they were stolen but he did it because he needed the money.

Your Honor, the impression given by Mr. Argondizzo was that he got a couple of tickets from a man named Charlie as a favor to Mr. Alfano here and they engeged in a couple of limited transactions of sales of airline tickets because there was some sort of promotion.

The statement of the witness, Mr. Argondizzo shows they were engaged in a course of conduct. It was a business with them.

THE COURT: You can ask him. He still has the Fifth Amendment. You can ask him about what Mr. Alfano said, what he observed, what Mr. Alfano did and said before.

MR. CUNNINGHAM: Right.

MR. ROSNER: Your Honor, if I might inform the witness's counsel that insofar as the Government intends to cross-examine the witness in respect of Mike Loria and Steve as persons who introduced him to Charlie who is the alleged source of the tickets, in the witness's grand jury testimony, which I think is marked Government's 24, isn't it?

THE CLERK: No, the witness' grand jury testimony?

MR. ROSNER: 27, I'm sorry, your honor, on pages 12 and following, he was asked these questions and gave these answers:

"Question: Any other tickets that you know of? Please think very hard on this. Are there any other tickets besides the one you got for this fellow here and the tickets you got for your mother and her girlfriends?

"Answer: Not that I recall.

"Question: Not that you recall. Now, you say you got them from a fellow named Charlie; is that right?

"Answer: Yes.

"Question: Now, from where do you know Charlie?

"Answer: I met him at the bar two blocks from my house."

I just thought counsel should know that in light of the intended cross-examination in respect of the introduction by Mike and Steve.

THE COURT: Let's get him in to see if he's going to answer what I direct him to answer.

MS. SELTZER: Might I speak to him a minute?

THE COURT: What?

MS. SELTZER: Might I speak to him a minute?

THE COURT: You can speak to him first, yes. Go ahead. I hope we can get to the point where we can sum up this afternoon.

(Ms. Seltzer leaves the courtroom.)

(Pause)

(Ms. Seltzer and the witness enter the courtroom.)

MS. SELTZER: Where should I sit?

THE COURT: Right alongside the jury.

Please come over here, Mr. Argondizzo.

Argondizzo-cross

(The witness resumes the witness stand.)

(Jury not present)

THE COURT: I guess Ms. Seltzer has told you I sustained the objection to a particular question, but I direct you answer the questions just relating to the ticket you got from Charlie.

Go ahead.

THE WITNESS: Your Honor, no offense, I would like to take the Fifth on this matter because I feel I just really, you know, didn't want to come up here in the first place, your Honor.

THE COURT: You have been subpoenaed. You have answered questions with respect to tickets. You said you didn't know they were stolen.

Mr. Cunningham has a right to ask you a few questions about those tickets.

THE WITNESS: I feel, your Honor, I really don't want to answer any more questions, no offense, nothing against--

THE COURT: If I order you to answer them?

THE WITNESS. With due respect, I won't answer them.

THE COURT: Suppose we let Mr. Cunningham ask a few quest-ons now out of the presence of the jury.

THE WITNESS: I still don't want to answer them.

THE COURT: I'm not going to have the witness in the position of refusing to answer any questions to the jury, I think. Is there any objection to my proceeding that way?

MR. POSNER: To your proceeding, having the witness asked questions out of the presence of the jury?

THE COURT: Yes.

MR. POSNER: Would be preferable a t this time, your Honor.

THE COURT: Mr. Cunningham, proceed.

CONTINUED CROSS EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Argondizzo, you mentioned the name of Charlie as the person from whom you got these airline tickets, is that correct, sir?

THE WITNESS: Your Honor, again I have to stand on the Fifth.

THE COURT: You mentioned him on direct examination and consequently you must answer him now. I'll direct you to answer.

THE WITNESS: Yes, your Honor.

Argondizzo-cross

THE COURT: The answer to Mr. Cunningham's question is yes.

THE WITNESS: Yes.

Q Did you ever refer to this Charlie as Charlie the Ghost?

A Offhand, I don't remember.

Q Isn't it true, sir, that this Charlie, or Charlie the Ghost, has been dead for several years?

A I do not bnow this. The last time I saw him he was not.

Q When was the last time you saw him?

A The last time I had gotten a ticket.

Q When was that, sir?

A About a week after I had given Alfano his tickets or two weeks after, around about that time.

Q Which series of tickets? You said you gave him tickets for himself and you also gave him tickets for Mr. Maltese.

A It was around that time. I don't remember offhand. It's two years ago.

Q Do you know a man by the name of Mike Loria?

A Yes, I do.

Q Have you any airline tickets from Mike Loria?

THE WITNESS: I refuse to answer that question,

Argondizzo-cross

your Honor.

THE COURT: I think I'll sustain that objection.

Q Did you ever get an airline ticket from Mike Loria for Larry Alfano at the Crossroads?

THE COURT: That you should answer.

THE WITNESS: No, your Honor.

Q The answer was no?

A No.

Q Did you ever tell Agent Rigolizzo on August 22, 1974, that he advised on one of the occasions he obtained four airline tickets for the wife and children of Tony Triola to Germany? On the other occasion he purchased a ticket from Loria to fulfill an order from Larry Alfano at the Crossroads Bar?

THE WITNESS: I take the Fifth, your Honor.

THE COURT: This relates to transactions with Mr. Alfano, and so you should answer it.

MR. ROSNER: Your Honor, as long as the jury is not here, would your Honor permit me to make an observation?

THE COURT: Yes.

MR. ROSNER: The problem -- I may be wrong -- the first question is whether he got a ticket or tickets for Mr. Alfano from Loria, and the alleged prior inconsistent statement is that he previously said he got tickets from Loria for an order that was placed through Alfano which I think may be distinguished from tickets for Alfano.

THE COURT: If it was an order from Alfano, I think it relates to the direct examination and should be answered. He has answered, is that right?

THE WITNESS: Pardon me?

THE COURT: Did you answer that?

THE WITNESS: No, your Honor.

This question you just asked me now?

Q Yes.

THE WITNESS: I did not answer.

THE COURT: That's one you should answer.

THE WITNESS: Again I have to take the Fifth on it. I'm sorry.

Q Do you know a man by the name of Gus Larocca, L-a-r-o-c-c-a?

A Yes.

Q Who is Mr. Larocca?

A My cousin.

Q Where does he work?

A At Vincent's Clam Bar.

Q Does he still work there?

Argandizzo-cross

A I don't know.

Q Did he ever introduce you to a man by the name of Steve?

A I don't remember.

Q Ever introduce you to Steve the Hawk?

A At this time I don't remember, your Honor.

Q Would it refresh your recollection, he advised that a few months previous to meeting Loria he was with his cousin, Gus Larocca at Vincent's Clam Bar on Mott Street in New York City, where Larocca is employed. On this occasion Larocca introduced him to an individual named Steve, last name unknown. He's then described, with a big nose, leading to his nickname The Hawk, and during subsequent visits to the clam bar Mr. Argondizzo became friendly with Steve.

THE COURT: That's the question?

Q Whether or not you ever received any airline tickets from Mr. Steve the Hawk.

THE WITNESS: I take the Fifth, your Honor.

THE COURT: I don't think that's within the extent of the waiver.

MR. CUNNINGHAM: Your Honor, the further testimony is that, if I can read into the record, "At this point Argondizzo began ordering airline tickets from Steve. He advised that he ordered and received airline tickets from Steve on at least forty different occasions and on many such occasions more than one airline ticket was involved. He estimated he obtained over one hundred airline tickets from Steve. He advised that Larry Alfano, the Crossroads Bar, on Metropolitan Avenue, and himself would take orders for airline tickets, put up the money to buy the tickets from Steve, and thereafter sell and deliver the tickets to the passengers."

THE COURT: The last part of it relates to Mr. Alfano?

MR. CUNNINGHAM: That's correct.

THE COURT: Discussions with him. The first part of it is other tickets.

MR. CUNNINGHAM: Your Honor, the testimony so far has been they got these tickets from a man named Charlie who they have only contacted through the telephone, and has a travel agency someplace in New York, but they don't know.

Here is an admission that he got well over one hundred tickets from a man named Steve and that both he and Mr. Alfano would get the tickets, put the orders from Steve--

THE COURT: We spent an hour on the subject of the extent of privilege. You're not following what I ruled on.

Q What price would you pay for the tickets that you got from -- when you purchased these tickets from Charlie or from Steve? What price would you pay for them?

A From Charlie -- I didn't say Steve. Twenty-five percent.

Q You remember telling Mr. Rigolizzo you paid -- got a thirty-three percent discount?

THE WITNESS: Your Honor, could I say one thing, your Honor?

THE COURT: Yes.

THE WITNESS: In the course of time that these agents came down to me, they came down to my place of business about -- I'd say in a month's time, about twenty times. They made me lose my business, your Honor. I did not say anything to them at my gas station or anyplace what he's saying here. I don't know -- I don't want to answer any more questions, in all respect, if I have to go to jail for contempt, I'm not answering any more questions that I feel this is my right not to answer any more questions. I will not answer any more questions your Honor, with due respect to you.

MR. CUNNINGHAM: Your Honor, if I might put one comment on the record.

THE COURT: Yes.

MR. CUNNINGHAM: The opening paragraph of this 302 is Michael Frank Argondizzo voluntarily appeared at the FBI, John Kennedy Airport. He was advised of the identity of the interviewing agents as well as the nature of the interview.

Special Agent Michael R. Rigolizzo verbally advised him of his rights. He, Argondizzo, read his rights from a Warning and Waiver Form, st ated he understood his rights, was willing to answer any questions, but refused to sign the waiver on the Advice of Rights form.

He then made available the following information--

THE COURT: The witness has now said he's not going to answer any questions and the attempt to separate what is covered by the privilege from what is not is sufficiently difficult, so I'm not sure it would be fruitful. I'll wait until after the jury is seated with the case before I determine what to do with Mr. Argondizzo's refusal.

Argondizzo-cross

MR. ROSNER: Might I ask the witness one question in light of a previous question-- I would like to ask two questions in light of the previous questions that Government counsel has asked.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. ROSNER (out of the presence of the jury):

Q Mr. Argondizzo, you've previously been asked whether you placed your name -- I'm sorry -- your handwriting on tickets that you knew were stolen and completed the tickets in your own handwriting. Do you recall testifying to that?

A Yes.

Q On cross-examination?

A Those were about the tickets in front of me.

Q Pardon?

A Those were about the tickets in front of me?

Q No. You remember being asked--

MR. CUNNINGHAM: Could we please ask counsel not to lead the witness into obvious conclusive answers?

THE COURT: No, let's see what's happening.

Q Did you ever, physically, in your own handwriting, complete blank tickets with the names of persons, the flight numbers and the validation stamps?

Argondizzo-redirect

A No, your Honor, I did not.

MR. ROSNER: I think, your Honor, I would have to ask that in front of the jury in light of a previous answer or previous question and answer on cross-examination.

THE COURT: I don't think, Mr. Argondizzo, that you have a right to answer questions for one counsel and not for the other.

THE WITNESS: That's the question I was asked before, your Honor. That's the only reason why, your Honor. He had asked me that question before. I said the same thing.

THE COURT: We're already at one o'clock, a little after. I think I'll see whether you're gong to answer questions after lunch and we'll adjourn until ten after two.

MS. SELTZER: Excuse me, your Honor, I have a slight problem. I was supposed to begin a trial at 2:30 before Judge Bartels.

THE COURT: We'll try to get you out of here by 2:30.

MS. SELTZER: There was a hearing prior to the trial with co-counsel. I don't know if it's absolutely necessary that I be there before that hearing.

THE COURT: Yes.

MS. SELTZER: Is it possible you could call Judge Bartels' chambers?

THE COURT: I will.

Bring in the jury.

You can step out now.

(Witness leaves the courtroom.)

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, as you have observed, we have had some discussions, as you have inferred. I have counsel now here for Mr. Argondizzo and we'll adjourn until ten minutes after two this afternoon.

Meanwhile, don't talk about the case amongst yourselves or anyone else. Be patient.

(The jury leaves the courtroom.)

MR. CUNNINGHAM: Excuse me, your Honor, if I might approach the bench?

THE COURT: Yes.

MR. CUNNINGHAM: As a practical matter and with the intent of trying to alleviate the situation as rapidly as possible, I was wondering whether or not the Court would have any suggestions of possible alternatives--

MR. ROSNER: I think the Judge would like us all to go away.

MR. CUNNINGHAM: I'm saying it quite seriously, your Honor.

THE COURT: I have to get Ms. Seltzer out in time for her next engagement. The witness seems not to be quite sure what he wants to do. Maybe he isn't even following his counsel's advice.

MR. ROSNER: That's not unusual, as your Honor well knows. I would, your Honor, just so I don't create any more ripples than have already been created in the courtroom, if the witness persists in his invocation of his privilege, with or without your Honor's approval, for the record, I think I would have to, in the interest of my client, formally ask for a mistrial.

THE COURT: Your client put the witness on. According to his testimony, had known him for some time. I'll deny the motion.

If, after the luncheon recess, he refuses to answer questions, we'll be through. If he starts answering questions, I'll rule as they come.

MR. ROSNER: Very well, your Honor.

MR. CUNNINGHAM: Thank you, your Honor.

(Time noted: 1:10 p.m.)

(Luncheon recess)

AFTERNOON SESSION
(2:30 p.m.)

THE COURT: We're waiting now for Ms. Seltzer to get back up from Judge Bartels.

MR. ROSNER: Your Honor, perhaps while we're waiting, if Mr. Cunningham and I can approach the side bar--

THE COURT: Yes.

(The following occurred at side bar.)

MR. ROSNER: As indicated, I intend at this time to call, I think her name is Judy Veresca, V-e-r-e-s-c-a, I think it is. I have spoken to her, spoken with her late yesterday, and then this morning. She has informed me, in response to my questions, of information I think is evidentiarily admissible; she informed me that the Government also questioned her previously. She told me what she told the Government, which is basically the subject of the testimony I would seek to offer, with certain other information. In light of what happened this morning and my conversation I had with Mr. Cunningham I asked whether there is anything of which she is aware that I should know that might cause her, either on direct or cross-examination for her to invoke her privilege, and she has indicated no.

Mr. Cunningham, on the other hand, has inferred or implied that there may be something.

THE COURT: What did she tell the FBI?

MR. CUNNINGHAM: The thing that she told the FBI, primarily what she told, I assume, told to defense counsel; however, there are some patent inconsistencies.

MR. ROSNER: Inconsistencies are no basis-- unless there is evidence of a crime.

THE COURT: Miss Seltzer is here. Let's go ahead with the other matter.

MR. ROSNER: I wanted your Honor to be aware of that.

THE COURT: Maybe I should wanr her when she takes the stand, before she takes the stand, if she wants to invoke the privilege of self-incrimination at any time she should do it now or to get a lawyer for her at this time.

MR. ROSNER: I believe she already has been offered a lawyer. That's my understanding.

THE COURT: I gave a few names to Miss Koven, to get a lawyer if you need one.

Are you ready to go ahead?

MS. SELTZER: I didn't start yet. You mentioned to Judge Bartels there was a problem.

THE COURT: I told Judge Bartels that we'd be starting here at two and if somebody else could cover--

MS. SELTZER: There's someone down there for the hearing.

THE COURT: They said they're not going to pick a jury in your case this afternoon. He still has a jury out on another matter.

MR. ROSNER: If your Honor does instruct Miss or Mrs. Varisco in respect of her privilege, I would request your Honor do it outside the presence of the jury.

THE COURT: We'll do that as soon as she comes in. I think we ought to go on record in front of the jury now, not waste or lose any more time.

(The following occurred in open court.)

THE COURT: Bring in the jury, please.

THE CLERK: Should I bring in the witness?

THE COURT: Yes, please.

(The jury enters the jury box.)

(The witness resumes the stand.)

THE COURT: We're starting again, ladies and gentlemen.

Mr. Cunningham, please restrict your questions within the lines I have set and we'll see what the witness has to say.

CONTINUED CROSS EXAMINATION

BY MR. CUNNINGHAM:

Q Sir, do you know a man by the name of Steve the Hawk?

A Yes, I do.

Q Please keep your voice up. Did you answer yes or no to that question?

THE WITNESS: Your Honor, I feel I don't want to answer any more questions, your Honor.

I thought it over. I feel as though it's incriminating me. I feel very upset over it, no disrespect, but I just don't want to answer any more questions.

THE COURT: I told you this morning that I would protect you on a certain range of questions but not on questions that relate to your testimony on direct examination this morning. I think Mr. -- while you didn't testify about Steve the Hawk this morning, you mentioned Steve Maltese. I think Mr. Cunningham is trying to identify him.

MR. CUNNINGHAM: That's correct, your Honor.

THE COURT: Whether he's one or the other. I would order that you answer it.

A Yes, I do.

Q Did you ever purchase any airline tickets from him?

THE WITNESS. I declare the Fifth on that, your Honor. I won't answer any more questions.

THE COURT: I'll sustain that objection.

MR. CUNNINGHAM: Might I rephrase the question, your Honor?

THE COURT: Yes.

Q Did you and Mr. Alfano ever purchase any airline tickets from him?

THE COURT: This relates to your dealings with Mr. Alfano about which you did testify this morning. I'm directing you to answer that.

THE WITNESS: I know that, your Honor.

MR. ROSEN: Might I ask Mr. Cunningham to rephrase the question, then.

THE COURT: You might restrict it to Mr. Alfano's actions, under those circumstances, Mr. Cunningham.

Q Did you, Mr. Argondizzo, did you and Mr. Alfano have an arrangement with Steve the Hawk to buy airline tickets from him and then subsequently sell them?

THE COURT: That you should answer.

THE WITNESS: Your Honor, I just don't want to answer any more questions.

THE COURT: Just for the record, I direct you to answer it.

THE WITNESS: No disrespect against you, your Honor, I don't want to answer any more questions.

THE COURT: Do you want to answer any more questions?

THE WITNESS: No questions, your Honor.

THE COURT: I don't think you should ask any more questions in the presence of the jury then.

Mr. Rosner, have you any questions you want to put on redirect?

MR. ROSNER: I will be very brief, your Honor, if I may, from here (indicating).

THE COURT: Yes.

MR. ROSNER: I couldn't hear the witness's answers to the last two or three questions. I hope it's not repetitious.

REDIRECT EXAMINATION

BY MR. ROSNER:

Q Do you know whether Mr. Alfano knows the person you call Steve the Hawk?

A Do I know if he knows him?

Q Yes.

A I don't want to answer that question; I'm sorry.

Q I show you what has been marked Government's Exhibit 27 (handing to witness) and ask you if you've ever seen that before. Please look at it.

MR. CUNNINGHAM: I'm going to object to this line of questioning. Apparently the witness is willing to answer questions for the defense counsel but not for the Government.

THE COURT: So far he's refused to answer one question for the defendant but he hasn't said definitely he's not going to answer any more.

THE WITNESS: Your Honor, I don't know if-- I don't know what this is (indicating).

THE COURT: The question is whether you had seen it before and whether you're going to answer the questions for one counsel as distinguished from the other. Will you please look at Exhibit 27 in

Argondizzo-redirect

front of you.

A Can I look at it?

Q Yes, please.

(Pause)

Q Look through the pages.

(Pause)

A Yes, sir.

Q Have you ever seen that before?

A Yes, I did.

Q Have you read that recently or a copy of it?

A Yes, I did.

Q How recently?

A I feel I can't answer any more questions.

THE COURT: I'm afraid we'll have to excuse the witness.

MR. ROSNER: Very well, your Honor.

THE COURT: Please step down.

(Witness excused)

THE COURT: I'll excuse Ms. Seltzer for the time being.

MS. SELTZER: Thank you, your Honor. I'll be downstairs.

(Ms. Seltzer leaves the courtroom.)

THE COURT: Maybe I'd better excuse the jury before we go forward with anything else.

MR. ROSNER: Very well, your Honor.

THE COURT: Please go back to the jury room and don't talk about the case.

(The jury leaves the courtroom.)

THE COURT: I think we ought to bring in your next witness, Mr. Rosner.

MR. ROSNER: I'm afraid so, your Honor.

THE COURT: Let's see what's going to happen.

THE CLERK: Is she in the witness room?

MR. ROSNER: I think so.

JUDITH VARISCO, called as a witness, having been duly sworn, testified as follows, out of the presence of the jury:

THE CLERK: Full name.

THE WITNESS: Judith V-a-r-i-s-c-o.

THE COURT: I understand you have been subpoenaed by the defendant to testify here; is that right?

THE WITNESS: Well, I was subpoenaed by the man from the FBI and then I was sick and I didn't come to court -- I came to court Thursday and I got sick and they let me go home. I was supposed to come Friday and the doctor wouldn't let me, and I spoke to Mr. Cunningham yesterday, and, you know, due to the weather I didn't want to come out. He said, he called me and said that they didn't need me yesterday, and when they wanted me they would call me.

Mr. Alfano's attorney called me yesterday and said the State rested its case, and he was going to subpoena me, you know, to come to court.

THE COURT: In the event that the questions relate to any matter on which you may feel that answers would tend to incriminate you, you have a right to refuse to answer or you have a right to answer and waive your constitutional rights, or you have a right to have the assistance of counsel if you want it.

If you were subpoenaed to be called on the defense case, perhaps Mr. Rosner would like now to ask the type of questions that you plan to put to the witness and see whether she has any hesitation about answering it.

MR. ROSNER: I would be happy to do that, your Honor. I perceive at least, based on prior witnesses subpenaed that my questions won't cause a problem. I'd be happy to ask the questions anyway.

THE COURT: Suppose we have a little.

How long will it take to ask your questions?

MR. ROSNER: I don't think more than about three or four minutes.

THE COURT. Let's see what you're going to ask and what Mr. Cunningham will ask.

DIRECT EXAMINATION

BY MR. ROSNER:

Q Where do you reside?

A 966 Seneca Avenue, Ridgewood.

Q Do you know Mr. Alfano?

A Yes, I do.

Q Can you identify him?

A Sitting at the table in the yellow shirt (indicating).

Q I show you what has been marked as Government Exhibit 19 (handing) and ask you to look at that.

(Pause)

A Do you want me to read it?

Q Please do.

(Pause)

MR. CUNNINGHAM: If I might in the interest of time, this is an 8-page transcript we're now asking the witness to read -- I think that the witness has previously read this. Have you asked her -- do you know whether or not the witness has read this yesterday?

Have you read this recently?

THE WITNESS: Yes.

MR. CUNNINGHAM: Could we perhaps go on the basis of her memory?

Q Did you read that exhibit before?

A Yes, Mr. Rigolizzo brought it to my home when he served the subpoena.

Q Approximately when was that?

A Last Tuesday.

Q Last Tuesday.

Do you recall having a telephone conversation with--

MR. ROSNER: Strike that.

Q Where were you working in August of 1973?

A In Mr. Lucky's.

Q Pardon?

A Mr. Lucky's.

Q What is Mr. Lucky's?

A It's a bar and restaurant.

Varisco-direct

Q Do you recall having a telephone conversation on or about August 7, 1973, with Mr. Alfano?

A Yes, I do.

Q Is Government Exhibit 19 in evidence substantially the substance of the conversation you had?

A Well, I guess it's about the conversation, yes.

Q In that conversation you made reference to airline tickets. Do you recall that?

A Yes.

Q Will you please tell the Court your best recollection as to the events leading up to your purchase of airline tickets as referred to in that exhibit.

A Just this part of it or what happened before that?

Q Everything leading up to your purchase of the tickets.

A I had a charge account in a clothing store owned by a fellow named Wally Casio. I was there buying clothes on my charge account. I was planning on going on vacation.

Wally asked me if I had gotten my tickets yet.

I said no.

Varisco-direct

He said that he could get me discount tickets through a travel agency if I was interested.

So I said, "How much of a discount?"

He said, "About fifty, sixty dollars a ticket."

I said, "What kind of tickets?"

He said they were tickets that were given, you know, to people that worked in the travel agency from the airline, that they could travel at discount. If they don't use them, then they sell them.

I said, "O.K."

Then he had called me up and told me he could get the tickets but that I had to give him $400 first and then he would bring me the tickets.

I told him I wouldn't give it to him, you know, I say, "When you bring me the tickets, I'll give you the money, or take me to the travel agency and I'll buy them there."

He said no, he couldn't do that, that this friend of his, Mike, was the one who was getting it from the travel agency.

I said, "Then take me to Mike."

He said Mike wouldn't give him the tickets and that he didn't want to take it, but that I could call him up. He said, "Do you know where the Crossroads is?"

I said yes.

He told me to call up over there and talk to Mike. Maybe Mike would give me the tickets; so that's what I did. And--

Q Then what happened?

A Well, I called up, or Larry called the bar. I don't remember who made the call. Larry might have called and talked to my boss or whatever, and I spoke to Larry about the tickets and asked if he knew Mike, you know, and he said yes, and then he said to forget about Wally, that he would talk to Mike to get the tickets for me.

Then Mike brought me the tickets.

Q Did you ever meet Mike?

A Only the day he brought me the tickets.

Q Pardon?

A Only the day he brought me the tickets.

Q Do you know his last name?

A No, I don't.

Q Had you seen him previously?

A I just saw him in the witness room.

MR. ROSNER: I would ask at that point,

your Honor, the witness Argondizzo come out at that point to be identified, which I don't think involves--

THE COURT: Yes, it was Mr. Argondizzo?

THE WITNESS: Right.

Q Do you recall who you paid the money to for those tickets?

A I gave it to Mike, I gave Mike the money when he gave me the tickets.

Q At the time you received the tickets were they completely filled out?

A Yes, they were.

Q From whom did you receive the tickets?

A From Mike.

Q Was there anything other than the tickets that you received from Mike at the time he gave you the tickets?

A Well, there was a little card attached to it, you know, business card for a travel agency, and he told me if I had any problems with my flight or anything to get in touch with them and they would, you know, take care of it for me.

Q Would you do me a favor and look at the sheet No. 6 of that Exhibit No. 19 before you.

A Yes.

(Pause)

THE WITNESS: O.K.

Q Do you recall that part of the conversation you had with Mr. Alfano?

A Roughly, you know.

Q Can you tell the Court what you were talking about in terms--

A On page 6?

Q On page 6.

A About what?

Q "If I get nailed with them..."

Q That's not on this page.

THE COURT: That's what?

THE WITNESS: That's not on this page.

THE COURT: Repeat your question, Mr. Rosner.

Q Tell the Court what you meant when you told Mr. Alfano, "What if I get nailed with them."

A If I have any problems with the ticket being I didn't work for the travel agency.

Q Did you have a discussion with Mr. Alfano either before or after that conversation in that regard? If so, when and where.

A No, not about that.

Q How many tickets did you purchase on this occasion?

A Four

Q To where?

A Colorado.

Q Did you give Mr. Alfano any money for those tickets?

A No, I did not.

MR. ROSNER: I have no further questions, your Honor.

THE COURT: You may cross-examine.

MR. CUNNINGHAM: Your Honor, I think I would rather have it come as a surprise to the witness.

THE COURT: What?

MR. CUNNINGHAM: I would rather have it come as a surprise to the witness and give her a chance to think about it between now and the time the jury comes out. I would rather it be a first impression.

THE COURT: Are you willing to repeat your answers before the jury and be subject to cross-examination on them?

THE WITNESS: I guess so.

THE COURT: Bring in the jury.

(The jury enters the jury box.)

THE COURT: Will you stand and be sworn, please.

(The witness is duly sworn.)

THE CLERK: Full name.

THE WITNESS: Judith Varisco.

DIRECT EXAMINATION

BY MR. ROSNER.

THE COURT: Please speak loud enough so that Mr. Rosner can hear clearly and all the people on the jury can hear what you say.

THE WITNESS: All right.

Q Where do you reside?

A 96 Seneca Avenue, Ridgewood, Queens.

Q I ask you to look around the courtroom and tell the Court and jury whether you recognize anybody.

A Mr. Alfano and the two gentlemen at that table (indicating).

Q How long have you known Mr. Alfano?

A About four years.

Q Directing your attention to August of 1973, can you tell the Court and members of the jury where you were employed at that time.

A Mr. Lucky's Bar and Restaurant in Ridgewood, Queens.

Q Ridgewood, Queens?

A Yes.

Q I show you what has been marked Government Exhibit 19 (handing to witness) and ask you simply whether you have seen that before.

A Yes.

Q How recently?

A Excuse me

Q How recently?

A A week ago today.

Q Did you ever hear a tape recording of a conversation of which that is a transcript?

A No, I didn't.

Q At the time you saw that a week ago today, have you had a chance to read it?

A Yes, the man from the FBI let me.

Q Pardon?

A Mr. Rigolizzo let me read it at my home.

Q Do you recall that conversation?

A Parts of it.

Q On or about August of 1973 did you purchase any airline tickets?

A Yes, I did.

Q How many?

A Four.

Q Will you tell the Court and members of the jury all of the events prior to and leading up to your purchase of these four airline tickets.

A I had a charge account at this guy Wally Cascio's store and I was there buying clothing, you know, getting ready to go on vacation and Wally asked me where I was going and, you know, I told him.

He asked me if I made my reservations and had my tickets.

I said no, not yet.

He told me that he could get me airline tickets at a discount from the travel agency.

I asked him what kind of tickets they were?

He told me that they were discount tickets that were given to employees, you know, to travel with, and if they didn't use them, they sold them.

I asked him how much I would save on them.

He said about fifty or sixty dollars.

So I told him that I was interested.

He told me that he would get in touch with me in a few days, find out, you know, where I wanted to go, when I wanted to go and everything.

He called me and I told him, you know, when I wanted to leave.

Then about a week or so later he called me up and he told me he couldn't get me the tickets unless I gave him $400 first.

I told him that I wouldn't give it to him. I told him, "You bring me the tickets," that I would pay for it, but I wasn't just going to give $400 like that of my money.

He told me that the guy Mikie was getting them from wouldn't give them unless he had the money.

I told him, "Why don't you bring Mikie to me or take me to him?"

He told me he'd call Mike up at this bar, the Crossroads, and he asked if I knew where it was.

I said yes, you know, that I called to speak to Mikie and said I spoke to Mr. Alfano--

Q Is that the conversation set forth in that exhibit or another conversation?

A That's it, you know, as well as I remember.

Q Did you ever meet the man you referred to as Mikie?

A The day he brought me the tickets.

Varisco-direct

Q Pardon?

A The day he brought me the tickets.

Q Mike brought you the tickets?

A Mike brought me the tickets.

Q Where is that?

A Down at Mr. Lucky's.

Q Pardon?

A Down at Mr. Lucky's.

Q Anybody with him?

A No, he was by himself.

Q Did you make any payment to him for those tickets?

A I paid him when he gave me the tickets.

Q How much did you pay him; do you recall?

A I don't remember. It was around $600 or around there, more than $600.

Q Is there anything else he delivered to you at the time he delivered the tickets to you?

A Yes, he gave me a little white business card from a travel agency.

Q Do you recall the name of the travel agency?

A No, I don't. It was someplace in the city.

Varisco-direct

Q Pardon?

A Someplace in the city, in Manhattan.

Q In Manhattan?

A Someplace in Manhattan.

Q Do you recall where in Manhattan?

A Midtown, somewheres in midtown, but I don't know exactly where.

Q Did you ever give Mr. Alfano any money for those tickets?

A No, I did not.

Q I direct your attention to page 6 of Exhibit 19 in front of you. I ask you to read that to yourself.

(Pause)

Q The fourth line from the top. Can you read that out loud, please.

A "If I get nailed with them, right."

Q That's you talking?

A Yes, that's me.

Q Can you tell the Court and jury what you intended to ask at that time?

A That, you know, if I can get in trouble for using the tickets since I didn't work for any airlines. I mean -- not airlines, travel agency.

Q Pardon?

A Not -- travel agency, not airline.

Q Did you previously discuss that with either Wally, the man you identified as Mikie or Mr. Alfano?

A Wally, I did.

MR. ROSNER: Would you bear with me one moment, your Honor.

THE COURT: Yes.

(Pause)

MR. ROSNER: I ask your Honor through the Clerk to ask Mr. Argondizzo to come out.

THE COURT: Bring him in, please.

THE CLERK: He's not in the witness room.

THE COURT: Find out if she can identify him otherwise.

Q Do you know Mike's last name?

A No.

Q Have you seen him previously today?

A Yes, your Honor --

MR. CUNNINGHAM: I'm willing to stipulate Michael Argondizzo is Michael--

THE COURT. Let Mr. Rosner proceed.

A He was in the witness room with me before I came in.

Varisco-direct

Q He was in the witness room with you?

A Yes.

Q Before you came in?

A Yes.

Q Was he the only person in the witness room today?

A No, his lawyer was there.

Q Aside from the lawyer.

A No, that's all, just the three of us.

MR. ROSNER: No further questions.

THE COURT: You may cross-examine.

CROSS EXAMINATION

BY MR. CUNNINGHAM:

Q I believe you said that you had a conversation with a Wally Cascio when you were in his clothing store.

A Yes.

Q That was regarding the sale of airline ticketw?

A Right, the purchase of them.

Q The deal did not go through because you were not willing to front the money to Mr. Cascio; is that correct?

A That's right.

Q Why were you afraid to put up the $400, down payment?

A I don't trust anybody with my money.

Q Did you think there might be something wrong with these tickets?

A I didn't trust Wally that much to give him my $400.

Q Why didn't you trust Wally? You had a charge account in the store.

A That I paid for. I mean I paid the charge, just to give him $400 and he tells me, you know, the guy went out of business or he didn't have any more tickets, you know, something, I don't know.

Q You were afraid of being ripped off by Wally; is that correct?

A I guess you could put it that way.

Q In other words, would it be fair to say Wally did not enjoy your complete faith and trust?

A I don't trust anybody completely when it comes to money.

Q I believe you said on direct examination that you recognize this transcript as being the transcript of a telephone conversation that you had with Mr. Alfano approximately in August of 1973.

A Yes.

Q When was the last time you had seen that transcript?

A When Mr. Rigolizzo brought it to my house.

Q That being on October 14th, 1975?

A I believe so.

Q Did you tell Mr. Rigolizzo at that time you did not recall the conversation?

A I told Mr. Rigolizzo that I remembered having a conversation with Mr. Alfano on airline tickets but I couldn't swear after two years that that was it, word for word.

Q Mrs. Varisco, I want you to listen to this conversation. I want you to tell us whether or not you recall this conversation, whether or not in fact you did have this conversation with Mr. Alfano in August of 1973.

THE COURT: Are you ready to play it again?

MR. CUNNINGHAM: Yes, your Honor.

(Exhibit 18, a tape, is played in the courtroom.)

Q Mrs. Varisco, did you have that conversation with the defendant Larry Alfano?

A Yes.

Q If you will notice on the Government exhibit in front of you, I think it's Government Exhibit 17, it refers to you as June rather than Judy.

A Yes.

Q Your name is Judy; is that correct?

A Yes.

Q Do you have a nickname?

A No.

Q How about Ju, J-u.

A Larry calls me that.

Q Calls you J-u, if you spelled it, J-u?

A Yes.

Q That could account for him calling you June in this transcript?

A I didn't hear him say June, it was Ju.

Q If someone was to call you Ju, that they would write down June?

A I guess so.

Q But this is you, though, in the transcript?

A That's me, yes.

Q Turn to page 2 of the transcript. You were concerned about getting the airline tickets and I believe Larry said to you that the man is right here with me; is that correct?

A Yes.

Q Who is that man who was with Larry?

A Mike.

Q Excuse me?

A Mike.

Q That would be Mike Argondizzo?

A Yes.

Q Then there was a conversation there about Wally Cascio. What was the matter with Cascio? What was the problem with Mr. Cascio?

A I don't know. Mike wouldn't give him the tickets because he owed him money and he wanted the money for the tickets. I wouldn't give it to him without the tickets.

Q It says here that -- a little later on, page 4 of the transcript, Mr. Alfano is saying, halfway down,

"June: In other words, he wants the money laid out before he brings the tickets.

"Larry: No, only from this guy, because this guy is jerk around. He owes us money, so we got to collect cash from him, understand?"

Is that the Wally Cascio you're talking about there?

A Yes.

Q Do you know whether or not he was selling him tickets in the past?

Varisco-cross

A I don't know what it was about, it was just said like that, you know, that that's why Mike wouldn't give him the tickets.

Q Because of the poor relationship between Mr. Alfano and Mr--

A No, between Wally and Mike.

Q Wally and Mike.

Wally was selling tickets, right, out of his clothing store?

A Yes, he was-- I don't know about to anybody else, I mean. He approached me with them.

He was getting the tickets from Mike; is that right?

A That's what he told me.

Q Apparently Larry was getting these tickets from Mike also?

A That's the way I understood.

Q You could have bought these tickets then from any one of these three people?

A I didn't know Mike and I didn't know that Larry had tickets.

Q Did you know that Larry was selling tickets to anybody else?

A Only when he told me on the phone.

Varisco-cross

Q This was the first conversation you had with Mr. Alfano regarding these tickets?

A No.

Q You had a previous conversation about tickets?

A Yes.

Q How did you find out Larry was selling tickets?

A When-- Larry had come down the bar that day and we were talking. He said, "You already got your vacation"--

I said "Yeah, if this jerk brings in the tickets."

He said, "Where did you get them?"

I said, "This guy is supposed to be getting me discount tickets."

He says to me, "What kind?"

I says, "Through the travel agency."

He said, "Is that discount tickets?"

I said, "I guess that's what they are. They're for the people in the travel agencies."

Larry said, "I could have gotten them for you." He said, "Did he tell you who he was getting them from?"

I said, "Yeah, this guy Mike, but I don't know him."

Larry says, "That's the same guy I buy my tickets from."

I says, "Well, the deal's already made, supposed to bring me the tickets in a day or two."

That was it.

Q What was the reason for the bringing the tickets to you at the last minute rather than, the day before, rather than giving them to you right after you paid cash?

A I didn't pay to the tickets until I got them.

Q I'm saying, if you turn to page, the bottom, page 5:

"Larry: O.K., don't bother with this guy, if he calls you or whatever it is. Tell him forget about the whole deal, you're not interested in it.

"June: Yeah (inaudible) What the fucks going on?

"Larry: Yeah, well, it does get a little leery, but it really doesn't matter. We usually do like about the day before, you know, we, we make sure we give 'em to you."

Why would it be important to give you the tickets the day before rather than giving them to you in advance?

A I don't know.

Q What was Mr. Alfano leery about on these tickets?

A I don't know.

Q Is Larry getting a cut on these tickets, making money on these tickets?

A Not that I know of.

Q What did Larry mean over there about seven lines up, where it says,

"Larry: Well, you're getting them through Mikey, you're getting them through Mikey, so leave--the price gotta stay the same.

"June: All right.

"Larry. I can't cut his price. You know what I mean?

"June: Yeah.

"Larry: That I can't do."

A From the way I understand it, Wally was, you know, making something on the tickets, I guess he tacked on something for himself. I don't really know how Wally and Mike had it worked out, but Larry had told me, you know, we had had the conversation in the bar that he probably could have gotten them for me cheaper. I guess that's what he meant.

Q On page 6, a reference there about three-quarters of the way down, where it says,

"June, or Judy: Yeah. Well, I'll take your word for it.

"Larry: Right. I sent Stevie, his family, everybody, and nobody had any problems."

Who is that Stevie there referred to?

A Fellow named Stevie comes down to the bar.

Q What's his last name, do you know?

A I'm not sure of it.

Q Do you know a Stephen Maltese?

A Yes.

Q Is that the Stevie they're referring to?

A Maybe.

Q How often do you go to the Crossroads bar during this period of time?

A The time -- This time?

Q Yes.

A Not very often. Occasionally. I still go occasionally.

Q Who was your boyfriend at this time?

A A fellow named Ray.

Q What is his last name?

A Pagan.

Q How do you spell that?

A P-a-g-a-n, Pagan.

Q Was there problems between Mr. Pagan and Mr. Alfano?

A No, not between them. Ray was just very jealous over Larry. He was a very jealous person.

Q Why-- Going now to page 7, at the bottom,

"Judy: Ah, listen now, I don't want my boyfriend to know I'm getting them through you now.

"Larry: O.K.

"Judy: You know what I mean?

"Larry: Right.

"Judy: So if he's here, give 'em to Vinny and I'll give Vinny the cash when I see you walk in. I'll hand Vinny the cash and you give me the tickets.

"Larry: O.K."

Why did you not want him to have any business dealings with Mr. Alfano?

A Because he didn't believe that Larry and I were just friends. He was very jealous.

Q Excuse me?

A He didn't believe Larry and I were friends.

Varisco-cross

He was jealous over Larry. He thought Larry was too good looking, too suave. He couldn't believe we were just friends. He didn't want me to bother with Larry. He knew about the tickets through Wally, you know, I had told him about him but I didn't want him to know Larry, that I was getting them, Larry was going to get them for me, you know, because he would have probably had a fight. He's jealous.

Q Is it your testimony your boyfriend Ray Fagan, was jealous of Larry? Did you go often to the Crossroads Bar in which Larry is the manager of?

A No, not when I was going out with him.

Q How would you be running into him? Apparently this conversation -- you had a conversation about that with this Larry from the Crossroads.

A Because Larry came down to Mr. Lucky's.

Q Wouldn't Ray be upset about Larry coming down to Lucky's, where you worked?

A That's a public bar. He can go anyplace he wants.

Q He never told you he didn't want you associating with him?

A Yeah.

Q Did you ever travel on these tickets?

Varisco-cross

A Yes, I did.

Q Did you have any trouble?

A No, I didn't.

Q You said before that you were afraid of fronting the money, that you were afraid of losing; is that right?

A Yes.

Q Why wouldn't you trust Mr. Cascio or any of these other people?

A I wouldn't trust anybody with my money. I work too hard for it.

Q You were afraid of possibly losing the money; is that correct?

A Yes.

Q Didn't Mr. Alfano warn you that you could lose this money again?

A No.

Q By buying these tickets?

A No.

Q Who were you going with on this trip?

A Ray.

Q And who else?

A His brother and his girlfriend.

Q Brother and his girlfriend. What would have happened if you had gotten sick and couldn't go on this flight?

A I don't know, I didn't think about that.

Q You would have lost your money for the ticket, wouldn't you?

A Why, I would have brought them back.

Q To who?

A To Mike.

Q What would you have told Mike?

A Give me back my money, here's the ticket. I didn't use it. Let him take it back to the travel agency.

Q I refer you to page 6, about the eighth line down --- Let's start with the third line down. You're now inquiring into the legitimacy of these tickets.

"Judy: Now, let me ask you something though.

"Larry: What?

"Judy: If I get nailed with them, right.

"Larry: Yeah.

"Judy: What am I out, the bread?

"Larry: Ah, well, it's all according to how it happens, you know what I mean. There should be no reason you should get nailed. There's only one way you could possibly get nailed with them, Babe, that's if you try for a refund.

"Judy: Nah, I ain't going to do that, I'm gonna use them.

"Larry: Well, let's say for argument's sake one of the per-- people on the trip don't want to go.

"Judy: Yeah.

Harry. You lose the ticket; if you try for a refund, then you gotta get nailed."

What did he mean by that?

A Well, since I was paying a lower price for them, right, and I took the ticket to the airline, and tried to cash it in, the airlines wouldn't know I paid a lower price, so they would give me the full price and then I would be in trouble because I got more money from the airlines than I'm supposed to get, you know, than I actually put out.

Q What do you think the airline wrote the full price. Don't you think this would be dangerous for the airlines to do?

A I'm sorry, I don't understand you.

Q You thought you could take these tickets to the airline and get a refund on it if you wanted to;

is that right?

A No, that's what we couldn't do.

Q What would happen if you did it?

A I will get in trouble with the airlines.

Q For what?

A Say I paid $200 and they would give me $300, right?

Q Yes.

A So now I'm stealing $100 from the airlines that I'm not entitled to. Then I could get in trouble.

Q Get arrested for stealing the money?

A Right.

Q Did you ever think why the airlines might put a price of $300 on a ticket which they only received $200 for and take that risk of losing an extra $100?

A I'm sorry.

Q By giving you a ticket?

A Right.

Q For which you only paid $200 which had written on it $300. Weren't they suffering a possibility of your being slightly a bit dishonest? Cheating the airline?

A I didn't get the ticket from the airline. It came from the travel agency.

A 445

Q Wouldn't there be a risk of that, of the airline suffering the loss if you weren't so honest?

A You mean if I bought it from the airlines?

Q If you bought this ticket.

A I don't understand.

Q I'm sorry.

If you had taken this ticket to the airline and said you wanted a refund.

A Right.

Q Wouldn't they have given you a refund?

A Yes, then that's how I could have gotten in trouble. I wasn't entitled.

Q Don't you think it's foolish of the airline to put themselves in a situation where they could be taken advantage of by every customer that comes through?

A No, because these weren't tickets the airlines sold. These were tickets that they gave to the people in the travel agency.

Q They gave these tickets to people.

A On a percentage, yes.

My ex-husband owned a travel agency. He used to travel all the time for almost nothing.

Q Did you ever do any work in a travel agency?

A No.

Varisco-cross

Q When he traveled all the time for nothing--

A Not nothing; low price.

Q Low price?

A Yes.

Q --did he write his own tickets?

A I don't know. I don't know.

Q Was he required to get airline tickets to fly on?

A No, he used to have tickets all the time.

Q When he would be writing tickets for customers, he was able to write the tickets in his own office, isn't that right?

A I guess he did.

Q If someone off the street came in, said they wanted a ticket, he would write them out a ticket?

A I guess so. I don't know. I was never in the office. I never went there.

Q Now, when he was flying on his 25 percent discount, was he able to write the ticket himself or did he have to have the tickets written by the airline itself?

A I don't know. I don't know how he did it.

Q How do you know he was able to fly at discount?

A Because he told me.

Varisco-cross

Q Did you ever see any of those tickets?

A I guess I did at one time or another. He used to fly to Europe a lot.

Q Do you recall if the price on the ticket reflected the price he paid for the ticket?

A I don't know. I don't remember. I would just see the stub in his pocket or something, you know, I never really looked at them.

MR. CUNNINGHAM: No further questions.

THE COURT: Any redirect, Mr. Rosner?

MR. ROSNER: A few questions, if I may, your Honor.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. ROSNER:

Q You testified, I believe, that you had a discussion with Mr. Alfano concerning airline tickets prior to the telephone conversation you referred to in Exhibit 19, the tape recording of which you have just heard.

A Yes.

Q Did you have any discussion with Mr. Alfano at that time concerning how the tickets could be sold at twenty-five percent less than they appeared?

A That's when I had -- when Larry had come down the following day to see Vinnie. That was the owner of Mr. Lucky's.

MR. CUNNINGHAM: I'm going to object. This is going to be hearsay.

THE COURT: It's a continuation of a conversation that was discussed. I'll listen to it.

MR. CUNNINGHAM: I believe it's a brand new conversation that took part before the telephone conversation.

THE COURT: This is the one you asked about, as I understand.

MR. ROSNER: You asked on cross.

A Larry had come down to see Vinnie, the owner of Mr. Lucky's one day. When he was there I told him -- we were talking about, you know, my trip and I had brought up the ticket to him. I told him I was getting tickets through a travel agency, discount tickets. So Larry said to me, "executive discount tickets?"

I said, "I don't know. I guess so. I just know they're tickets that the travel agency gets, you know, for them to fly on."

So he says to me, "No, don't cash it in if anybody goes." He says--

I say, "Why?""If you're flying on a discount you can get in trouble by taking it to the airlines to get a full refund, you know."

Then we just talked about the tickets in general. Larry had said, asked me who I was getting it from.

I said, "This guy Wally, you know, getting it from Mikey."

Q What was your understanding as to who was supposed to use these discount tickets?

A People employed that work for travel agencies or owners.

MR. ROSNER: No further questions.

THE COURT: You can step down.

Thank you, Miss Varisco.

THE WITNESS: Thank you.

(Witness excused)

MR. ROSNER: Might we approach the side bar.

(Side bar)

MR. ROSNER: I did not want this in front of the jury.

I intend with the Court's permission to offer Indictment 75-CR-715.

THE COURT: What's the theory of that?

MR. ROSNER: The indictment charges, I think thirteen different airlines with giving rebates against tariffs and against regulations, substantially in excess of twenty-five percent.

I think it would be admissible as to policy and knowledge.

MR. CUNNINGHAM: First of all, it's not an indictment, it's an information.

MR. ROSNER: Sorry.

MR. CUNNINGHAM: Also not an indictment. It's an information and was a plea of nolo contendere. I think the fact it was a plea of nolo contendere has no effect on the case before this court.

THE COURT: I don't see that East German National or any domestic airline is on it.

MR. ROSNER: There are some domestic carriers, Transworld, as an example.

MR. CUNNINGHAM: I must be responsible in great part for this information in front of you. Those were on the North Atlantic route from John F. Kennedy Airport to places in Europe, nothing to do with going to Miami, nothing to do with domestic flights.

THE COURT: Too remote to be received.

MR. ROSNER: Very well.

THE COURT: You can mark it for identification.

MR. ROSNER: I anticipated the Government would voice an objection. Perhaps, your Honor, since it is part of the official court files, we can have it deemed, 75-CR-715, the information and the pleas, marked.

THE COURT: Yes.

(In open court)

MR. ROSNER: The defense rests, your Honor.

THE COURT: The jury, please go back to the jury room for ten minutes or so. Don't talk about the case.

(The jury leaves the courtroom.)

THE COURT: Mr. Cunningham, will there be any rebuttal?

MR. CUNNINGHAM: Yes, your Honor, there will be.

THE COURT: We'll take five minutes.

Will it take long?

MR. CUNNINGHAM: The direct will not, your Honor.

MR. ROSNER: I anticipate-- I think I anticipate Mr. Cunningham's rebuttal. If my anticipation is correct, based on my conversations with him, I would have a legal objection. It is my guess he's trying to try to put in extrinsic evidence with respect to the cross-examination of misconduct by the witness Argondizzo.

I think if it relates to those matters, No. 1, I don't think from a point of view of evidence, extrinsic evidence as to those collateral matters can be put in in rebuttal, No. 1.

No. 2, if the witness is going to testify about conversations with Mr. Argondizzo, I don't think it's admissible either, since it's not binding upon the defendant Alfano.

THE COURT: Is that what's involved?

MR. CUNNINGHAM: Yes, your Honor, as far as Mr. Argondizzo is concerned, I said before, he was interviewed at length by Mr. Rigolizzo. The testimony that is in his 302 differs greatly in many material respects of testimony that was elicited from the stand this morning.

THE COURT: I'll rule on it when I come out.

MR. ROSNER: Thank you, your Honor.

(Recess)

THE COURT: Mr. Cunningham, what do you expect to try to show from Mr. Rigolizzo?

MR. CUNNINGHAM: The primary thing I wish to show from Mr. Rigolizzo, your Honor, is that Mr. Albergo -- I'm sorry, Mr. Alfano and Mike, if I can just read the portion, primary portion.

"Argondizzo advised he ordered and received airline tickets from Steve on at least forty different occasions and on many of such occasions more than one airline ticket was involved. He estimated he obtained over one hundred airline tickets from Steve. He advised that Larry Alfano of the Crossroads Bar on Metropolitan Avenue and himself would take orders for airline tickets, put up the money to buy the tickets from Steve, and thereafter sell and deliver the tickets to the passengers."

THE COURT: You have something rather similar through Mrs. Varisco's testimony already, don't you?

MR. CUNNINGHAM: To an extent, your Honor, but I still think an argument can be made to the jury at this point that Mr. Alfano was doing this merely as a consideration on a basis for his good friend Danny and his other good friend Steve Maltese, the owner of the bar, and Mrs. Varisco, when in fact the testimony here saying that they were doing this more as an enterprise rather than as a favor.

MR. ROSNER: I would like to be heard before your Honor rules after Mr. Cunningham has finished.

THE COURT: Yes.

Under Section 613-- Rule 613(b) Mr. Cunningham can do it if you have an opportunity to interrogate the witness on it, or where the interest of justice otherwise requires.

MR. ROSNER: If I might, your Honor, first of all, Mr. Argondizzo did not testify to that particular conversation, as your Honor knows.

Therefore I think it's improper rebuttal.

Second of all, I don't quite understand how Mr. Rigolizzo's testimony about a conversation he had with Mr. Arggondizzo can be admitted against Mr. Alfano.

Third of all, although I can question, cross-examine, Mr. Rigolizzo, I obviously can't cross-examine the declarant, Mr. Argondizzo, about that.

Fourth of all, your Honor, although obviously logically relevant, I would submit that it's inadmissible because its prejudicial value so far outweighs its probative value that it should be excluded. In effect, we're being deprived, No. 1, of the right of confrontation, because we can't cross-examine the declarant, Mr. Argondizzo.

No. 2, I don't understand that this is a statement binding in any respect on Mr. Alfano. I don't understand what conceivable theory it could be regarded as binding upon Alfano.

MR. CUNNINGHAM: Might I respond, your Honor?

THE COURT: Yes.

MR. CUNNINGHAM: Your Honor, much of what Mr. Rosner has said is true, and would be more than true if the Government had called Mr. Argondizzo as its witness or if in fact Mr. Argondizzo had never taken the stand, never offered any testimony whatsoever. However, in this case here, we have testimony proffered by the defense, and the full defense case goes in. On cross-examination certain questions are asked and answered, and then when it turns to an area the Government feels is relevant the Fifth Amendment is invoked. This would work, be a wonderful device for all defense in the future, just have a witness testify as to the rosy portions of the trial and have him take the Fifth Amendment on the rest of the trial. It certainly would hamper the Government to no end.

MR. ROSNER: Your Honor, first of all, as I indicated at the time, the witness's invocation of his privilege came as a shock and a surprise to me.

No. 2, as I indicated at the time and as I still feel, that worked a greater detriment to the defense than it did to the Government.

No. 3, the subject matter of Mr. Cunningham's proposed rebuttal was not covered in the witness's direct or what limited cross there was. He similarly declined to answer any questions I have--

THE COURT: It was covered in the cross-examination before he cut it off.

MR. CUNNINGHAM: I believe the one pertinent question was asked on cross-examination by myself and was answered. I think the question was, "How many tickets were you engaged in?" I think he said "In an amount under twenty." I have specific knowledge of that figure.

I said, "Could it possibly have been more?" He said, "Well, maybe," still gave an indication of being a small amount of tickets. Here he's talking about having dealt-- He stated that he or his cousin LaRocca introduced Cascio to Steve, and Cascio then started dealing directly with Steve.

Cascio did a large volume of business with Steve, estimated to be well in excess of over 200 airline tickets.

MR. ROSNER: There are only five charged in the indictment of the defendant Alfano, your Honor. What Mike did with Steve or Wally or anybody else--

THE COURT: The significant part is that Mr. Alfano and Argondizzo would take orders, put up money and take, sell and deliver tickets.

MR. ROSNER: Your Honor, the Government had this information at least in August of 1974, which is almost a year and a half ago. The indictment in this case was returned, first--

THE COURT: That has nothing to do with it.

MR. ROSNER: First in December of '74 and then a superseding indictment in April of '75. If the Government intended to offer this they should have pleaded their case properly.

THE COURT: No, they didn't have to indict for everything. They can prove the rest of it.

MR. CUNNINGHAM: The relevant portion I would want to get in--

MR. ROSNER: I don't see how it's binding upon the defendant Alfano.

MR. CUNNINGHAM. The relevant portion I would like to get in. He and the defendant Alfano obtained over one hundred tickets from Steve; they and -- he or Larry did then take orders for the airline tickets, put up the money, buy the tickets, sell and deliver the tickets to the passengers.

MR. ROSNER: This is the rankest hearsay.

THE COURT: Goes primarily to credibility and can't be taken as evidence in chief.

MR. CUNNINGHAM: Credibility of the witness.

THE COURT: From that point of view it's very hard for the jury to separate it. Subsequently I'm going to exclude it.

Anything else?

MR. CUNNINGHAM: I have one short rebuttal witness that will probably be five minutes.

THE COURT: Let's bring the jury in.

FRANK SCINTA, recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: You have some rebuttal?

REBUTTAL DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Scinta, you were previously sworn in this case?

A Yes.

THE COURT: You're still under oath. I don't swear people twice in the same case.

THE WITNESS: Thank you.

Q Mr. Scinta, in the seven years that you've been with the Air Transport Association have you ever heard of executive tickets?

A No, sir.

Q Ever heard of promotional tickets?

A No, sir.

Q Is it permissible to sell tickets at discount to the public?

A No, sir.

Q Do you know if it's against the law to sell tickets at discounts?

A That's correct.

Scinta-direct

Q Now, sir, do you ride on the airlines at discount?

A I do.

Q How does that come about?

A This is an agreement with all the airlines that they will provide the personnel of the Air Transport Association reduced rate travel at fifty percent.

Q How do you go about getting a fifty percent discount ticket?

A We are issued vouchers that reflect the routing of the ticket, the name of the employee, the ticket is then purchased at an airline ticket counter by using an air travel card, a credit card, and then the airline issues the ticket and the ticket in turn reflects in the ticket designator block, I.D., meaning fifty percent industry at fifty percent. The ticket in turn will reflect the fifty percent fare.

Q Sir, could you go to an airline and purchase a fifty percent industrial disocunt ticket for cash?

A No, sir.

Q Could you go to a travel agent and purchase a fifty percent, this industrial discount ticket for cash?

A No, sir.

Q Would a travel agent be authorized to sell you such a ticket?

A No, sir.

Q Now, sir, when you're riding on this industrial discount ticket, assuming the fare is one hundred dollars from Point A to Point B, what fare would show up on your ticket?

A It would be $50, the only difference would be the security charge, which would show the round trip security charge of 46 cents extra for the stopover.

Q In other words, the amount of money that you would pay to the airline would be the amount of money that would show up on the ticket; is that correct?

A That's correct.

Q If a travel agent was to sell an airline ticket which had written on it "$71," and only received, say $100, would that eventually surface through the ATC?

MR. ROSNER: Might Mr. Cunningham refrain from leading the witness.

THE COURT: Sustained. Rephrase it.

MR. CUNNINGHAM: If the Court would bear with me--

THE COURT: What would happen?

Q Could you tell us what the procedure is for the collection of moneys from airline agencies?

A Travel agents remit their moneys to a bank that we indicate, every ten days.

Q Sir, can you start with the auditor's coupon.

A The travel agent reports the auditor's coupon plus a sales report which reflects the serial number of the ticket plus the net remittance; that is the amount on the ticket less the travel agent's commission.

Q Would I be right in assuming then that if a ticket was to sell for $100 and the travel agent every ten days would have to remit $100 minus his commission to the airline?

A That's correct.

Q How much would his commission be on a ticket such as that?

A On point-to-point travel it would be seven percent.

Q Therefore, at the end of ten days he would have to remit $93 to the airline? Is that correct, sir?

A That's correct.

Q Now, if the person only received $75 or $76 for this ticket, what would he do then?

A If the net amount was $171, and he remitted $61, the bank would send him the difference for the money.

Q He would have to come up with the money?

Scinta-direct

A Which is correct, a shortage notice.

Q You mentioned before the auditor's coupon. Could you tell us what the auditor's coupon is, please?

A A ticket has four parts to it, part is the coupon, which is used to remit the money through the banking procedures, the agent's coupon,which is retained by the agent, and the flight coupons, which are uplifted at the time of the flight, plus the passenger part of the ticket, which is the remaining portion that the passenger has after the flight.

Q Would I be right, sir, these are all carbon copies, one after the other?

A That's correct.

Q What is printed on the top one theoretically should follow all the way down to the last one.

A That's correct.

Q The last one is the auditor's coupon, which is sent in with the sales report?

A The first one.

Q First one, rather, the original, sent in as the auditor's coupon with the sales report?

A That's correct.

Q There was testimony before that a travel agent is permitted to receive a discount on his own travel;

A That's correct.

Q Who writes the ticket which the travel agent utilizes to go on his discount flight?

A The airlines. It's on the airline ticket stock.

Q Would a ticket be valid if it was written on the travel agent's ticket stock?

A No.

Q For this discount?

A The travel agent employee or owners of the travel agency are entitled to fly based on the number of people in the agency, they receive one voucher per person up to twelve and they would remit by mail with the letter, explaining the purpose of the trip to the respective airline. They would indicate on the letter the routing, the date of the flight. They would enclose a check. This would be sent to the airline. They, in turn, would receive the airline ticket reflecting if it was a $100 ticket, and they get seventy-five percent, it would be for $25.

Q Is there a requirement that the travel agents, in order to qualify themselves and their people for this special privilege file documents with the airlines?

A Once a year they file with our organization a form reflecting the names of the employees who are authorized by being within the agency for one year

Scinta-direct

involved in the sale of air transportation.

Q Now, sir, is there any way that an airline would know whether or not the person requesting this travel was an authorized travel agent?

MR. ROSNER: Objection, your Honor, on several grounds. First of all, leading.

Second of all, it's speculative, and asks for a witness's opinion, something that obviously is not within his knowledge.

THE COURT: Overruled.

A As I indicated before, each one of these reduced-rate trips, the travel agent must submit a letter and also submit a copy of the form that they submit to us reflecting the names within the travel agencies and also a check to accompany the situation.

The ticket that they return back reflects only that $25, if it's a $100 ticket, and it reflects that it is an employee of an agency.

Q Would I be correct in assuming then even with these people going on their 25 percent or 75 percent discount travel, the corner of the box where it says how much they paid for it would then reflect the true price they paid for it?

A That's correct.

Scinta-cross

THE COURT: Mr. Rosner?

CROSS EXAMINATION

BY MR. ROSNER:

Mr. Scinta, how long have you been employed by [illegible] .r Transport Association?

A Approximately seven years.

Q Prior to that, what did you do?

A I was with Naval Intelligence.

Q When you went with the Air Transport Association did you go through a period of training?

A Not too much.

Q How did you find out about all of these different intra cases of discounts, ticket reporting?

A They have a travel agents' handbook and during the time that I was with them, I have been in many travel agencies checking on the sale of the tickets and part of the review of the sales involved the reduced rate transportation, which I just stated.

Q Did you get that out of an A.T.A. handbook?

A That's correct.

Q So that it's your possession, given to you when you were hired?

A Yes.

Q Could I get one of those?

A I think it's $8.50.

Q You testified, I believe, that owners and employees of travel agencies are authorized to fly at discounts, have you not?

A Yes.

Q What was the discount they're authorized to fly at?

A Seventy-five percent off.

Q They get seventy-five percent?

A That's correct.

Q That's distinguished from your industry discount, which is only fifty percent off?

A That's correct.

Q I assume that's because the agent is giving them business and you're perhaps giving them the business?

A No, the preference of the rate is to familiarize the travel agent with the various places in the world, it serves that real purpose.

Q The travel agent is selling the airline's ticket.

A That's correct.

Q And you're not?

A That's correct.

Q You're familiar, are you not, with airlines giving illegal rebates?

A I've read about it.

Q Pardon?

A I've read about it.

Q You have investigated it?

A No, sir.

Q No?

A No.

Q Do you know whether your agency has ever investigated it?

A This is not part of our function on the rebates I read about.

Q Airlines do give illegal rebates?

A From what I read.

MR. ROSNER: No further questions.

MR. CUNNINGHAM: One further question.

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q What is the maximum of tickets, of these 75 percent discount tickets, that any one travel agenc can get in one year?

A If there are fifteen people in a travel agency, the maximum they will get is twelve.

Q That means fifteen employees in a travel agency?

Scinta-redirect

A That's right.

Q What happens if they have a hundred employees?

A Still get twelve.

Q What happens if they have two employees in a travel agency?

A They get two.

THE COURT: Thank you, Mr. Scinta.

THE WITNESS: Thank you.

THE COURT: Step down.

(Witness excused)

THE COURT: Is there anything more, Mr. Cunningham?

MR. CUNNINGHAM: No.

THE COURT: Any surrebuttal?

MR. ROSNER: No.

THE COURT: The case is in. It's too late to start summations. We'll have to resume at ten o'clock tomorrow.

You've heard all the evidence, but you haven't heard counsel interpret it or ask you to interpret it. You haven't heard my instructions.

Go home and don't talk about the case. Talk about something else with your family, and don't talk at all to any of the people in the courtroom if you see them.

We'll continue tomorrow and hope you can decide.

Ten o'clock tomorrow.

(The jury leaves the courtroom.)

THE COURT: Mr. Rosner, have you any idea how long your summation will be?

MR. ROSNER: If your Honor asked me this morning I could have told you. In light of what's happened today I would guess probably between twenty minutes and a half hour. I'll try to keep it small.

THE COURT: How about you?

MR. CUNNINGHAM: I don't think my summation will be very long. Perhaps a half hour.

THE COURT: Then I can go on with the next case, perhaps.

(Time noted: 4:15 p.m.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------------------------------x

UNITED STATES OF AMERICA, :

75-CR-298
- against - : 74-CR-818

LAWRENCE ALFANO, :

Defendant. :

----------------------------------x

United States Courthouse
Brooklyn, New York

October 22, 1975
10:00 o'clock a.m.

Before:

HONORABLE ORRIN G. JUDD, U.S.D.J.

RAYMOND STALKER
ACTING OFFICIAL COURT REPORTER

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: MYLES CUNNINGHAM, ESQ.
Assistant U. S. Attorney

JONATHAN ROSNER, ESQ.,
Attorney for Defendant

Also present:

MS. MARION SELTZER, ESQ.,
Legal Aid Society
For Witness Michael Argondizzo

rs/ss

THE CLERK: Case on trial.

(Jury not present.)

THE COURT: Good morning. Be seated. I thought everybody was here.

THE CLERK: They're on the way to chambers. Mr. Cunningham objected to this equipment which I guess they're putting up during the night.

MR. CUNNINGHAM: Your Honor, I would ask that the wires and everything be taken down.

THE COURT: Take them down.

MR. CUNNINGHAM: Thank you.

THE COURT: Let me just comment on a request to charge. I have the defendant's request number 1, that is reasonable doubt and I'll give my own form which is substantially like it.

Number 2 is constructive possession and I'll give that except the part about delivering to a customer because I think the charge here is only with respect to two tickets or the five tickets that the defendant and his family used.

MR. ROSNER: That's correct, your Honor.

THE COURT: Number 3 is elements and I think that is correct.

Number 4 is value, that is correct.

Number 5 is a direction for acquittal if the value is less than a hundred dollars and under the statute there is a provision for a lesser included offense.

MR. ROSNER: Your Honor, I understand when I found the case, if the indictment says a hundred dollars and the jury finds less than a hundred dollars they should acquit. In other words --

THE COURT: It's not a good case.

MR. ROSNER: I thought it was very good, your Honor.

THE COURT: I believe it is a lesser included offense.

Number 6 is on knowledge and recent theft and I'll give the substance of that.

Are we ready now to proceed?

MR. ROSNER: Yes, your Honor. If I might for a moment, I neglected at the end of the defense case to renew the motions I made previously?

THE COURT: That's right.

MR. ROSNER: I would like the record, with your Honor's permission, to reflect the renewal of those motions?

THE COURT: Motions are being renewed and denied.

MR. CUNNINGHAM: Your Honor, would you also be good enough to advise the jury that all these wires and everything else they see are for another case shortly to start. There are wires all over the Courtroom. I didn't want them to think it is part of the government's case. The government did not put that in.

THE COURT: Yes. Bring in the jury.

(Jury enters jury box.)

THE COURT: Good morning ladies and gentlemen. I think we'll be able to start quite promptly this morning and without wasted time, we've had really no waste. There may be some more wires than yesterday. They have nothing to do with the case and pay no attention.

As I said, the government opened first and on the closing the defendant has the first summation, that is Mr. Rosner. You may proceed.

MR. ROSNER: Thank you, your Honor. May it please the Court, Mr. Cunningham, Mr. Foreman, and ladies and gentlemen of the jury:

A man far wiser than I said many years ago and I quote, "Our civilization has decided and very justly decided that determining guilt or innocence is a thing too important to be entrusted to trained men." Indeed the wisdom of that observation is at the very heart of our system of justice, the jury.

This places in the hands of twelve persons from all walks of life the awesome responsibility and the tremendous duty and the wonderful opportunity to determine whether the government has established the guilt of the person accused of a crime, and establish that beyond a reasonable doubt.

Those twelve persons, the jury, the twelve of you in this instance are the sole and exclusive and final judges in this case. Certainly you must accept the instructions of the Court on the law as it is given to you. But, to that law as the Court instructs you, you bring your own recollection of the evidence in the case. Your own common sense and your own judgment.

Now it is your sworn duty as the Court I am sure will instruct you that you must decide the ultimate issue here on the evidence presented and the ultimate issue is quite simple. Does this man, Lawrence Alfano, forfeit his liberty and his freedom, as the government establishes guilt of the crimes charged in the indictment beyond a reasonable doubt. Or, does he walk out of this Courtroom a free man. Has the government failed to sustain its burden of proof.

You may ask why do we convene in this Courtroom and go through the tremendous expenditure of time and expenses to ascertain the guilt or innocence of a human being. Indeed, you may ask isn't there a better way to do this. To find whether there is evidence beyond a reasonable doubt that a man committed acts of which he has been charged.

The best response I can give you is a quotation from a man I regard as our greatest judge and he said "There are few weapons in the arsenal of freedom, more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liability of a citizen. All governments, democracies and dictatorships, believe that those they seek to punish are guilty. The impediment of barriers or goals to all governments, when they prevent that purpose, but those barriers were devised and are impended and are precious because they prevent that purpose of forfeiting a man's liberty and its pursuit from passing on the challenge by the accused and unperjured by public opinion and public criticism. The society which comes to the methods by which they seek to impose its will upon members has already lost the feeling of freedom and is objected to by dictatorships. Then that is why we are here."

That is why we are here, to challenge the government and insist that they disclose to you, the members of the jury, all of the evidence on which they seek to forfeit the liberty and freedom of Mr. Alfano.

You must as I tried to sift through all of the evidence in this case come to a decision, has the government established Mr. Alfano's guilt of the two crimes charged in the indictment beyond a reasonable doubt.

Let us therefore look at the indictment and see what it is exactly what Mr. Alfano was charged with.

One count accuses Mr. Alfano of on or about and between April 25th, 1973, and June 25th, 1973, of willfully and unlawfully receiving and having in his possession two airline transportation association airline tickets, Exhibits 1 and 2 in this case, of a value in excess of $100 which had been stolen from Wings and Wheels and which the defendant Alfano at the time he possessed those tickets knew were stolen.

The second count charges that MR. Alfano on or about or between May 23rd, 1973 and July 23rd, 1973, unlawfully and willfully received and had in his possession approximately three air transportation association tickets, Exhibits 3, 4 and 5 in this case of a value in excess of $100, which were stolen from Wings and Wheels and at which time Mr. Alfano at the time he possessed those three tickets knew they were stolen.

Thus you must decide that these charges are the only matters of which the defendant Alfano was accused. The possession of the five airline tickets on the dates indicated with knowledge at the time he possessed it, that those five tickets were stolen.

Now what evidence is there from which you must decide these most important matters. The government called Mr. Crocker, Georgia Feet, George Zackaroff, Frank Scinta, Elijah Young and

Howard Brunk. They have also offered some 23 or 24 exhibits, including Exhibits 1 through 5, the airline tickets in this case that Mr. Alfano was accused of possessing with knowledge at the time he possessed them that they were stolen.

From the evidence which was received before you, some of it I offered my objection on legal grounds and are of no concern of yours. There does not now seem to be any real dispute that these airline tickets, these five documents which were in fact stolen, the testimony of Mr. Georgia Feet, Mr. Zackaroff and Mr. Scinta, about the documents about which they testified, seemed reasonable to indicate that these tickets were in fact stolen.

I asked to have their testimony recalled very carefully. For you will recall that each one of them stated under oath that there was no way they could tell from the face of those tickets that they were in fact stolen.

Indeed you have to examine those tickets. I daresay you must come to the same conclusion. That this, all three of those men, Mr. Georgia Feet, Mr. Zackaroff and Mr. Scinta so testified, except Mr. Scinta who testified that based on his training and experience and expertise as a consequence of one area of that ticket, he would have a suspicion about it. Now I ask you to remember Mr. Scinta's testimony in that regard concerning the knowledge because I will refer to it later.

What else did these men testify to. Howard Brunk of Southern Airlines testified that there is a delay of two weeks or a month or a month and a half between the time that the tickets were found to be lost and the time they were reported on the document that the government offered. They testified to another delay of between two weeks and a month, between the time the report on the Wings and Wheels form was made to the time, the so-called blacklist were issued.

They also testified as to the procedure used in distributing the blacklist and seeing to it that their purposes were effected.

Mr. Brunk testified quite frankly that while the airlines would like to have their personnel at the airport check each ticket, that he submitted it was not always done according to the book. It was not always possible.

Now what then did the government offer to proof to your satisfaction beyond a reasonable doubt that Lawrence Alfano ever in fact possessed these five tickets and what did they offer to prove to your satisfaction beyond a reasonable doubt that when he possessed these tickets at the time of his possession he knew they were stolen.

Miss Elizabeth Ng testified that the defendant Alfano appeared before the grand jury in this building on February 21st, 1974. He was advised in substance that there was investigation into stolen airline tickets. He was advised anything that he said could be used against him. What did Mr. Alfano tell the grand jury. Look at his testimony, Exhibit 24 which is in evidence.

THE COURT: Exhibit 14.

MR. ROSNER: I'm sorry, your Honor.

Thank you. You will conclude that that testimony from his own mouth is the only evidence that the government has which really establishes that he actually possessed those five tickets.

Now the government asked in the grand jury from whom you got the tickets and he told them from

Mike Argondizzo. The government asked him who used the tickets and he told them. Two tickets were used by his two children, Exhibits 1 and 2 when they went down to Florida to visit his parents at the end of the school year.

Three other tickets, not before you, were used by Alfano and his wife and another relative to go down to Florida after his children went down.

The government asked him if he got tickets for anyone else. He told them, "Yes, sir." He got tickets for Steve Maltese and two relatives of Mr. Maltese and those tickets are before you.

Now ladies and gentlemen of the jury, I ask you if in June and July of 1973 you were Lawrence Alfano and you knew that Mr. Argondizzo was in fact selling tickets that were stolen, would you ask him to have them issued in your family's name or in the name of close friends of yours. As well, there is the old axiom in the war. The guilty contrive false statement where no man pursue it for the purpose of concealing their crimes.

Did Mr. Alfano do that in February, 1974 when he was called before the grand jury. Indeed he did not. He answered the questions asked of him by the government prosecutor. He answered those questions knowing there was a pending investigation into stolen airline tickets and knowing the only questions that would be asked of him are the ones that the government attorney wanted to ask. There is no lawyer in the grand jury who could ask questions of him. What proof is there that in June or July of 1973 where Mr. Alfano got these five tickets from Mr. Argondizzo, what proof is there that he genuinely knew they were stolen.

I respectfully submit there is none. You heard the testimony of several witnesses which told you he repeated these to other persons that tickets were discounted, discounted to be used by travel agent personnel. But, sold by travel agent personnel at a discount.

Indeed, one of the witnesses testified it was sold the same reservations and in fact when she was served with a subpoena to testify here before you she was never called by the government. The government will doubtlessly suggest to you, perhaps insist to you, that this witness Julia

Varisco was not telling the truth.

I ask you, did the government convince you by cross-examination that she was not telling the truth.

I submit to you that her testimony was thoroughly credible. She responded to the government's cross-examination with candor and with honesty.

In rebuttal the government recalled Mr. Cina who testified, based on his own expertise as to the rates for industrial personnel who are employed by the Transport Association as to the mechanics of travel agent personnel securing discounted tickets. It is at 75 per cent off.

How would you know that had you not heard the testimony. Can you conceivably think that Mr. Alfano in June and July of 1973 knew that. He testified if you recall that is Mr. Cina, he testified if you recall that he heard of airlines giving illegal rebates.

Finally you heard Mr. Argondizzo. He testified such as he did. He testified on examination that he told the whole story to the grand jury sitting in this building in February,

1974. He also testified that he had not been indicted for possessing airline tickets. Although, he obviously possessed many many more tickets than Mr. Alfano did. He testified that it was he who had furnished these five tickets before you, Exhibits 1 through 5, to Mr. Alfano. He was never indicted for those acts. He then invoked his privilege against self-incrimination. Not incrimination of anybody else, but self-incrimination.

I'm certain as his Honor will instruct you, the invocation of privilege against self-incrimination may not be considered by you in any way as evidence of the guilt on the part of Mr. Argondizzo or anybody else.

I am certain if you think about what I just stated to you that Argondizzo was the one who supplied these five tickets to Mr. Alfano and to many many other persons and he has never been indicted for those acts. You may well wonder why he did what he did.

Again, I ask whatever evidence there is to support the accusation in the indictment that in June and July of 1973 when Lawrence Alfano possessed these five airline tickets, he knew then that they were stolen. Again, I respectfully submit that there is no evidence.

Now the government would submit to you that the telephone conversation between Mr. Alfano and Judy, Miss Varisco in August of 1973 is evidence of knowledge that the tickets were stolen. However, you can decide from Mrs. Varisco's explanation of that conversation, of her earlier conversations, not only with Mr. Alfano but with Wally Cascio as to her understanding of the other source of these tickets from travel agent discounts. Notwithstanding that, the fact that you know something in August, I submit in no way can you establish you knew it two months before that.

There is so much more that I could say to you on behalf of Mr. Alfano. The time is limited and you must shortly commence your most difficult task, determining whether Mr. Alfano loses his liberty and his freedom or walks out of this Courtroom a free man.

In your deliberations I ask you to be skeptical of everything that you have heard and seen in this Courtroom. Question every element of evidence, every piece of paper. In short, be a doubting Thomas so that you can truly say that you have considered the evidence against that most difficult burden, that the government has to meet, proving guilt beyond a reasonable doubt of the two charges contained in the indictment.

You were not asked to determine whether Mr. Alfano is a good man, a pillar of the community, an outstanding human being, merely whether the government has satisfied you beyond a reasonable doubt that he possessed these five airline tickets in June and July of 1973 knowing at the time that they were stolen.

Do your job conscientiously and honestly, carefully so that next month, next year you can say to yourselves, "I did the right thing for another human being, for my country and for my conscience." If you do that, that is all that anyone can ask of you. If you do that, I respectfully submit that your verdict will be not guilty.

Thank you.

THE COURT: Mr. Cunningham, you may proceed.

MR. CUNNINGHAM: Thank you, your Honor.

Judge Judd, Mr. Rosner, Mr. Foreman, ladies and gentlemen of the jury:

Ladies and gentlemen, we're here today to decide the guilt or innocence of a man by the name of Larry or Lawrence Alfano. We have been sitting here for little over a week and unfortunately the days that we have spent here do not equal the amount of testimony that we have heard. I thank you very much for your patience with us and your obvious attention to the witnesses when we did have them.for you to listen to.

I cannot ignore, while I attempted to be as eloquent in my summation as Mr. Rosner, I just don't have that ability. But, I would like to talk to you for a short period of time anyway about the facts in the case as to exactly what your function is. What you have to find.

Now, the judge, Judge Judd at the end of my summation will instruct you on the law and he will give you some extensive instructions as to how, how you should apply this law. Well, let's get down to the nitty gritty of the case, if you want to call it that.

What is the government's burden. The government's burden is to prove the defendant

Lawrence Alfano possessed five airline tickets on two separate occasions. That he knew they were stolen. The tickets had a value of over $100. And that they were stolen in interstate commerce.

Turning to the issue of a hundred dollar evaluation of the tickets, I would submit that Mr. Cina told you that the value of these tickets is the face amount on the tickets. He's an expert in this regard and he said that in his opinion these tickets were worth the amount of money written on them in this case here, I believe the sums of money on the tickets was $170 and change on two of the tickets and $171 and change on the other three tickets.

As far as interstate commerce is concerned Mr. George Feet and Mr. Zackaroff, they came in and told you these tickets were produced by Rand McNally Corporation in Nashville, Tennessee. They travel to Bayonne, New Jersey and they were going to the Greenwall Travel Agency, the Bayonne Travel Agency, both of which were located in New Jersey.

The Court will instruct you that these tickets were actually in transit from Nashville, Tennessee to New Jersey. You can find that these tickets were in interstate commerce.

Now, as far as possession of these tickets. What do we have on the possession of the tickets. Well, the defendant in the grand jury, he testified that in the later part of June he got tickets for his two children as soon as they were leaving school, as they got out of school. He shipped them down to meet his parents. That he travelled there in the beginning of July. The tickets here are dated June 24th. I can't prove to you ladies and gentlemen that these tickets are the tickets the children flew on. There is certainly evidence there from circumstancial evidence that you can infer that these were the tickets that were used in the grand jury and he said he had two children and he had Ronald and an Anthony or Tony and the tickets you can see, any of the evidence you can take into the jury room with you to look at. I think it's Mr. or Mrs. which coincide with R. and T. and Alfano. As far as the telephone, remember the telephone conversation where he told Judy I sent my children down. I sent my whole family down. As far as Mr. Maltese's tickets he told us in the grand jury he had got the tickets for his friend Steve Maltese. Here we have tickets for Mr. Maltese and approximately it is in the same period of time. When he's talking to Judy again on the telephone he said, "Sure these tickets are all right. I even sent Stevie." I ask you this, you know Larry fairly well, who is Stevie. He told you who Stavie was. Steven Maltese. So, there's pretty good evidence that these are the tickets that we're talking about.

Even more important was something that counsel just said. When he was talking about the knowledge, which is the item that we're going to get to in a minute, he said what evidence is there that Alfano possessed the tickets in 1973, and that he knew they were stolen. I don't think there is much of a question as to whether or not he knew these tickets that he actually possessed, he had these tickets and defense counsel made a big point of talking about why, if he actually had stolen these tickets would he go ahead and tell us about them in the grand jury. Counsel said something else. He said the defendant knew there was a grand jury investigation going on into stolen airline tickets. He also knew that he had gotten subpoenaed to testify before that grand jury. If you recall, when he was being asked, "When was the last time the defendant had seen Mr. Argondizzo," it was right outside the room. They were sitting together. A lot of subpoenaes went out in this case. There was an investigation going on.

So now why were these people being subpoenaed to testify. You have to think, this is conjecture that you can make, "Boy, I guess they must think we have something or we tell something to the grand jury." But, the judge will say I have to prove it. I have to prove interstate commerce, the value is in excess of $100 and I have to prove the defendant possessed them and more important, ladies and gentlemen, I have to prove that the defendant had knowledge that these tickets were stolen at the time he possessed them. That is the difficult part, ladies and gentlemen. I think I can do it. It's difficult but put your mind in the defendant's frame of mind. Make out like you've been selling, Wally's been selling you the tickets. I wonder how many got subpoenaes on this thing. Let's go in and stonewall them. Let's go in and stonewall themaand let's tell them nine-tenths of the truth and we'll pretend we got to the travel agency, we called them executive tickets, something like that. We don't tell them anything and maybe they'll find somebody else.

I'm not saying that's exactly what happened, I'm saying that is a possibility. It's up to you to decide.

Just because Mr. Alfano went into the grand jury and said that he had these tickets and he dealt a couple of times in the tickets is not indicative of knowing that these tickets were stolen. Now, let's talk about the question of knowledge.

(Continued next page.)

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As I said that is the most important portion. If you will recall, last Wednesday we first started this trial and made an opening statement to you, a very brief statement. Basically I read the indictment to you and told you what was in the indictment. I said the important thing the government has to show was knowledge.

How does a person show, how does the government show what was going on in Mr. Alfano's mind back in the summer of 1973, June, July, August, September. I didn't just open the side of his mind and look in and say did you know at the time. It's not leaving a fingerprint on something. You use circumstantial evidence to try to look into his mind and try and find out what he was thinking by his activities, by his conduct, by his attitude and by all the circumstances surrounding Mr. Alfano.

Now what is circumstantial evidence?

Judge Judd will have a definition of circumstantial evidence and he will tell you that circumstantial evidence is just as credible as direct evidence. It is a different type of evidence. Let me give you an example.

A man has been married for fifteen years.

He's got a wife, two kids, a dog. He's got a 9 to 5 job. His office is right around the corner from the railroad. He takes the 5:03 train home every single night. Walks into the house every night at 6:15. He's been doing this now for fifteen years and everynight he has a habit. He walks in the front door, his habit is he puts his hat on the table next to the door, reaches over and pulls off his tie. Puts it on the top of the piano. Walks into the kitchen where his wife is cooking dinner, goes up to her, puts his arm around her and kisses her on the cheek. Goes upstairs to the childrens' room where the two children are doing their homework. Pats them on the head, talks to them for a moment. He pets the dog and the dog starts barking in joy to see his master at home.

He comes home one night, walks in the front door, takes off his hat, it's another night, puts it on top of the table, takes off his tie and puts it on top of the piano. He walks into the kitchen and his wife isn't there. Dinner is cooking and his wife isn't there. He turns around and walks upstairs and he's playing with the children and the dog is barking. Two minutes later his wife

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walks in. Though she sees his hat on the table. The next thing she sees is his tie on top of the piano and then she hears the children laughing and she hears the dog barking.

Ladies and gentlemen, I submit that is circumstantial evidence that her husband is home because she has not seen him, she has not seen her husband, she's not heard from her husband but that is circumstantial evidence and I submit to you that is pretty good evidence for that housewife to think that her husband is home.

The only thing she's missing is the kiss on the cheek.

Ladies and gentlemen, let's see if you bring that little bit of circumstantial evidence to the case at bar. So, we get that dog barking at what the circumstantial evidence is in the case. What do we have. We have these tickets. They were stolen. One set of tickets, the Alfano tickets were stolen on April 26, 1973. They were validly dated on May 5th, 1973. Approximately two weeks later the Maltese tickets were stolen on May 23rd and dated June 25th. A little more than a month later.

Judge Judd in his instructions will tell you that recent possession of the fruits of a crime is knowledge or can be inferred as an inference that the defendant may have known these tickets were stolen. That's just a little more circumstantial evidence. There's plenty of little things which we're going to get to.

Another thing, if he wasn't selling these ticketsat full price, he wasn't selling these tickets at ten or five percent, he was selling them at one-third discount. Although Mr. Argondizzo testified they were selling them at twenty-five percent discount at the very beginning, if you recall, look at the grand jury testimony of Mr. Alfano. He sold them at on-third off. Figure it out mathematically on the tickets. He even said it when he was talking to Judy on the the phone. One-third off.

The Judge is also going to tell you when you are selling an item which has a price below which is discounted below, there is an inference that can be made from that. What else is there? The tickets were sold out of a bar. Sold out of a bar and grill. These are Air Transportation Association of America tickets and these can only be sold by authorized agents at the locations, they have to be authorized. A bar is certainly not an authorized agent. It's not greatly important, ladies and gentlemen. Just another little indication. It's indicative of something.

What else do we have? Where do these tickets come from? Let's leave that for a minute. Where do these tickets come from? Let's not leave it, let's talk about it. Where do these tickets come from.

Well, we hear Wally gets them from somebody. Now, Larry is getting them from somebody and all of a sudden I got them. I have five or six or so of them. Who's Mike Argondizzo? He's an admitted hijacker. He didn't go to jail, ladies and gentlemen, because you don't punch somebody in the nose. Mike Argondizzo is a hijacker, how were these tickets stolen. We don't know how they were stolen. They were going from point A to point B. The thefts are interstate commerce. Hijacking has the connotation of taking a gun out. But, it's still the end result of trying to take property that is moving in shipment. That is indicative of something. What is this man Alfano who purports to be a bartender at the Crossroads Bar, what is he making. A hundred and fifty dollars a week with no other income, yet he drives a 1973 Cadillac. This is 1974. He's got a 1973 Cadillac which according to his testimony his good friend, Bob Sampogne was leasing for him.

Boy, I wish that I had a friend like that. But, anyway, he doesn't have any other businesses. Yet, here he is selling airline tickets out of a bar and he would like us to think he was doing this for a favor for some good friends of his. Remember that portion of the tape when he was talking about competition between Wally, forget Wally, we have to deal through Mikey.

Ladies and gentlemen, from the conversations that you heard back and forth on this tape here, I would think that it is a burden to get the airline ticets for somebody. It must have taken three or four phone calls according to the testimony, you first have to speak to the customer, find out where he's going, what flight he wants to take. Then he has to call that in to his sources. He has to call it in to them soon. If you've ever taken an airplane flight and you've ever changed your reservations, you want this done. You want the other thing done, you want them changed a little bit and there's going to be problems. I submit he was in the business of selling airline tickets.

You heard the testimony from Mr. Cina that the plate that was used on two of the tickets was Central Tours. He had it in his possession for one whole year before that period on these tickets, one whole year. He says that Central Tours never had a second plate. This plate with the N standing for New York is the one that appears on these tickets. That's sort of like finding the tie on top of the chair or on top of the piano when the wife came home.

Let's talk about credibility of the witnesses in this case.

The government's witnesses in this case never gave damaging testimony against the defendant. They never pointed him out as the person who did something. They were just adding circumstances. What did Mr. Cina tell you. He worked for the Air Transportation Association. He investigated this case. He said he didn't know anything about Lawrence Alfano. All he knew, he was giving background on

Air Transporation Association.

Miss Ng, she's the grand jury stenographer, she was the one that sat there with a machine and took down the testimony of Mr. Alfano and Mr. Alfano was duly sworn.

Mr. George Feets and Mr. Zackaroff, they simply told us about the wings and wheels shipment that was going from Tennessee up to New York.

Mr. Brown from the airlines came in and he said, "Well, I'd like to be able to check all the tickets going from New York to Florida, but it's a physical impossibility."

So finally the government asks you that you can believe or disbelieve any portion of their testimony that you care to. It's completely up to you and Judge Judd will tell you that that is your function. I would like to try and assist the jury in showing the credibility of the government's witnesses. I don't think I will stop right now. I don't know who's credible and who is not credible. I just don't think I can do that.

Let's talk for aminute about the defense's witnesses.

You've got Mr. Argondizzo and he testified that he was involved with checks, convicted of checks in 1966. It was petty larceny in 1970 and hijacking on 1975. Just pause a minute, ladies and gentlemen. There's no reason, no reason to believe him. No reason whatsoever to believe him. But, look at the type of mistakes he made. Look at his testimony. Look at the way he testified and figure out how much faith you would put in that testimony.

Did he look anxious to testify yesterday? Think about what he testified to. He got on the stand and readily admitted he is the one that got the tickets. He did this, he did this. He wasn't going to tell anything that happened to anybody else. Think about that. Think about it.

Now Judy. Judy was a customer. She wanted some airline tickets. She's dealing with Mr. Wally and I'm getting airline tickets. The next thing she's talking to Larry. Larry can get some airline tickets. What is this? When is the last time you went into two places and found everybody selling airline tickets in the clothing store and the bar and grill. She's not supposed to be there at that bar and grill and it was her boyfriend, Tony Pagan, he doesn't like Larry. He doesn't want her to have anything to do with Larry. Stay away from him and she goes there. Why, that's the story. Then she says she's afraid of fronting the money, giving Wally the money up front to get the tickets. After hearing the testimony I'm not sure I would either. She said she worked real hard for this money.

Yet, she is willing to take a chance. She buys these tickets and she gets sick or someone else gets sick, they're not going to be able to cash them in for a refund.

I submit, ladies and gentlemen, there is a portion of her testimony where she said that the bread, I lost the bread, page 5, you will hear it. This is Judy, "What am I out the bread?" Larry, "Ah, well, it's all according how it happened, you know what I mean. There is no reason you should get nailed. The only way you could possibly get nailed with them, babe, that's if you try for a refund."

"Judy: No, I ain't going to do that, I'm going to use them."

"Larry: Well, let's say for argument's sake one of the per, people on the trip don't want to go."

"Judy: Yeah?"

"Larry: You lose the ticket, if you try for a refund then you gotta get nailed."

I submit, ladies and gentlemen, that once this ticket has been written with the name of Judy on it someone else's, it's no good to anybody if she doesn't go on that flight. If the time passes she's stuck with the tickets. She swallowed that because she's getting a third discount. She'll take that chance. But, I can't go ahead and give this ticket back to the seller of these tickets, he's only got X amount of tickets. He can't be like the airlines where they can rip them up and throw the tickets away. He's already made out. It's like a ticket to yesterday's theater concert.

Ladies and gentlemen, I don't think we can say that Judy was up there and was telling us a lie. I think that she was probably told, "Yeah, these are executive discount tickets. That's all, you have no problem."

If anybody offered her the tickets she'd put her hands over her eyes and say give me the tickets.

so they're executive tickets. She's been living with that since 1973. She practically believes it now. She practically believes and she doesn't want to know these tickets are stolen. Whether she knew they were stolen or not is clearly irrelevant. Whether or not he knew they were stolen.

What else do we have in this case? We have the idea of don't try to get a refund, can't change the tickets and everything, but you heard Mr. Brunk's testimony that he can get away with it but don't try for that refund.

Ladies and gentlemen, the airlines are serious about one thing. They don't want to lose money once they get the $171. They don't want to give it back to you. They want to make sure everything is right because they don't want to make a mistake. That's why they were going to try to collect. They can't try for a refund. That's where your going to get nailed.

Listening to the tapes, which is the main evidence, the main evidence against the defendant and what came out of his own mouth tells you what he said.

Forget not talking about Wally.

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"Larry· Okay, don't bother with this guy if he calls you. Whoever it is tell him to forget the whole thing. You're not interested in it."

"Judy· Yeah."

"(Portion inaudible), what the fuck's going on?"

"Larry· Yeah, well, it does get a little leery, it does get a little leery," what are they really selling, they're selling executive discount tickets and she's worried about are they legitimate tickets. "But it really doesn't matter. We usually do like about the day before, you know, we make sure we give them to you, the day before."

They're afraid she's going to do something with the tickets if she has them in advance. Why would you have to have tickets the day before and not a couple of days in advance. Why? Do we hear the children laughing a little bit upstairs?

Ladies and gentlemen, as I said before this is a profit motive we're talking about. A man who says he's selling tickets in the grand jury. He admitted to selling the tickets to a milkman and to another friend Steve Maltese and to his other friend, Mirium and now he's selling the tickets to Judy and her three friends. She's buying the tickets for a boyfriend and two friends. Well, that I never understood. But, he's selling tickets here at a profit. What is his motive. How do I know there's a profit motive? Again, I have to go to his own testimony. He said he makes a little less, but that's our price. He admitted he's in it for his help, it's a profit.

Then we have this mysterious travel agent, good old Charlie. Mr. Argondizzo who was in mid downtown, but he doesn't remember where. He had lots of tickets. Always sold them by telephone. Call him up on the telephone. Get him by the telephone. Where is this Charlie? Where is this Charlie?

Mr. Cira told you how his accounting procedures work. You can't have executive tickets. There are no such things. There is no such thing as promotional tickets. He said there are such things as discount tickets. He says he flies on discount tickets and the travel agents can fly on discount tickets. But, the price that goes in the box in the lower left-hand corner of that ticket is the price that the person pays and he told you why that has to be. Remember, we talked about -- excuse me, ladies and gentleman.

He said the reason for that is because the accounting procedure you have the auditors come in and the auditors come in to the company and the sales reports, the sales report that has to accompany a check and the check has to be forthe amount of the money that is on that order which is the amount of money on the sale, minus 7 percent commission.

If I'm a travel agent and I'm going to sell hundred dollar tickets for $60 and write $100 and send the $100 in to the airline, according to my mathematics thatwould cost me $50. It's a good story, it's a good story, it's not bad. But, it doesn't fly, ladies and gentlemen. It does not fly. When we talk about Mr. Argondizzo again, let's get back to him for a second.

He got arrested. When he got arrested he throws up a little smoke screen. The defense calls him in and then throws a smoke screen.

Ladies and gentlemen, I submit there are a lot of courts in this land, a lot of courts and the fact that he was not arrested in this case should have no bearing. No bearing whatsoever on your decision here today.

Let me bring up one other point. I almost overlooked it.

Why did Mr. Alfano use the name of his children on the tickets? Why did he use the right name with his friends, Steve Maltese and why is he going to use Judy's right name on this?

Ladies and gentlemen, I submit to you when you're traveling, very often you could be asked for identification. Very often you get asked for identification and let's assume that these people at the airport pull a spot-check. You have to identify yourself and if your name is Smith and the ticket is different, that is going to flag everybody in town. Is that not also indicative of guilt in the event that you're caught?

Here, you have a perfect out. If these tickets were stolen would I put them in my own name? I'm also carrying such indentification.

THE COURT: You've been just about a half an hour.

MR. CUNNINGHAM: Thank you, your Honor. I'll be through very shortly.

Ladies and gentlemen, I submit to you this is a complicated case. This is not a simple case. There is no such thing as a simple case when a man is on trial. But, it's very important. It's an important case. It's very important to the defendant sitting here. It's very important to the public.

I would ask you when you go into the jury room to deliberate, consider the importance of this case. But, also be true to yourselves and if you feel strongly one way or the other, come out with a just and true verdict. I think that after seeing al tthe evidence as presented, the only just and true verdict can be guilty as charged.

Thank you ladies and gentlemen.

THE COURT: Mr. Vale and ladies and gentleman, we'll take a short recess before my instructions. I will have the clerk give you some forms for ordering your lunch so that you can eat lunch in the jury room while you are deliberating, unless somebody has a sudden heart attack which I hope no one will. Still don't talk about tha case because it's not been given toyou for your consideation.

(Jury excused.)

(Short recess.)

(Whereupon, the court resumed.)

(Jury not present.)

THE COURT: Yes, gentlemen?

MR. CUNNINGHAM: It was brought to my attention that inadvertently, during the course of my summation, the defendant was accused of stealing the airline tickets instead of possessing them. I don't recall. I wonder if you could give a correcting instruction to the jury in the event that I did?

MR. ROSNER: In fact I might say I spoke to Mr. Cunningham during the recess and early in the summation I jotted down, I think it's almost verbatim, Mr. Cunningham saying, "Why if he had actually stolen the tickets if he would testify in the grand jury, etc."

THE COURT: Yes?

MR. ROSNER: Subsequently he said he was in the business. Mr. Alfano was not in the business of selling airline tickets.

THE COURT: That is a characterization. It might be based on three sets of sales which evidence it and I don't think the jury would misunderstand.

All right, bring the jury in.

(Jury enters box.)

THE COURT: Gentlemen at counsel table, Miss Villa Nueva, ladies and gentlemen:

You have now come near the climax. You have heard the evidence. You have heard the argument of counsel and it is my duty to tell you the law that you are to apply in deciding the case. First I will describe the general principles that apply to all criminal trials, then the nature of the charges in this case and the specific rules that apply to those charges, something about how to evaluate the witnesses and a few comments on the evidence and finally something about how you should reach a verdict.

In our system of justice it is the prosecution's duty to do his best to present the government's case and defense counsel to represent his own client's interest the best they can. The Court enforces the rules of evidence and the jury decides the truth or falsity of the testimony and inferences to be drawn from the evidence which is, I think, the real problem here.

It is your duty as jurors to follow the law as I have stated it to you and to apply that law to the facts as you find them from the evidence.

You are the sole judges of the facts and you are to perform your duty without bias, prejudice, for or against any party. The law doesn't permit jurors to be governed by sympathy or prejudice or public opinion. The law presumes a defendant is innocent of crime. So, nothing but legal evidence presented before a jury may be considered in support of any charges. The presumption of innocence is enough in itself to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the guilt of the defendant on a particular count from all the evidence in the case.

Now, I will just say a few words about how Court's have interpreted reasonable doubt.

It starts from the word reasonable doubt and it is a doubt based on reason and common sense arising from the state of evidence or absence of evidence. A reasonable doubt doesn't mean a doubt a juror asserts arbitrarily to avoid doing something that is unpleasant. I doesn't mean proof beyond a reasonable. It's rarely possible to prove anything to an absolute certainty and the law doesn't require this. The phraseology has been frequently referred to as proof beyond a reasonable doubt refers to the type of doubt that makes you hesitate to act in your own important affairs. Where you heard conflicting facts that have been presented before you, you have to make up your own mind. This rule of proof beyond a reasonable doubt operates on the whole case. It doesn't mean that each bit of evidence must be proved beyond a reasonable doubt. It means that the sum total of the evidence, both from the government and from the defendant, must satisfy you as to each element of the crime charged or else you must acquit.

Finding a person to be guilty of a felony and subjecting him to the criminal penalties is a serious matter and you can properly consider this in deciding whether you have a reasonable doubt.

(Continued on next page.)

THE COURT (Continuing) But, if you are convinced beyond a reasonable doubt of thedefendant's guilt it is your duty to find him guilty and not be swayed by sympathy.

An indictment is just a formal method of accusing a defendant of crime. It's not evidence of any kind against the accused and the defendant's plea of not guilty means that the indictment and the plea create the issues that you are to decide. The law never imposes a duty on a defendant in a criminal case to testify or to produce any evidence. The fact that the defendant did not testify in this case does not constitute any inference of guilt. It is not a fact that you can even talk about in the jury room. You must consider the case solely on the evidence that has been presented here in the courtroom.

Since you are deciding the issues related to the indictment, I will read the indictment with the caution I have given to you about the fact that it merely states the issue.

"On or about and between April 25, 1973, and June 25, 1973, within the Eastern District of New York, which is this district, the defendant, Lawrence Alfano , did willfully and unlawfully receive and have in his possession approximately two Air Transportation Association airline tickets numbered 8213, 865-043 and 8213,865-044 having a value in excess of $100, which goods had been stolen from Wings and Wheels Express, Incorporated, while moving as part of and constituting an interstate shipment of freight from Nashville, Tennessee to Newark, New Jersey, the defendant, Lawrence Alfano, knowing the same to have been stolen.

Count 2 reads: "On or about and between May 23, 1973 and July 23, 1973, within the Eastern District of New York, the defendant, Lawrence Alfano, did willfully and unlawfully receive and have in his possession approximately three Air Transportation Association airline tickets numbered 8214-939-194,8214-393-195 and 8214-939-196 having a value in excess of $100, which goods had been stolen from Wings and Wheels Express, Incorporated, while moving as part of and constituting an interstate shipment of freight from Nashville, Tennessee to Newark, New Jersey. The defendant, Lawrence Alfano, knowing the same to have been stolen.

The dates in the indictment may be approximate as long as they are adequate to let the defendant know the charge against which he must defend.

So you don't have to find exact correspondence with the indictment.

The charge is based on Section 659 of Title 18 of the United States Code which says, "Whoever steals or unlawfully takes from any aircraft, air terminal, airport or air navigation facility with intent to convert to his own use any goods or chattels moving or which is part of or which constitutes an interstate shipment of freight or other property, or whoever buys or receives or has in his possession any such goods or chattels knowing the same to have been stolen, shall in each case be fined or imprisoned.

I don't go into the terms of the penalties because that is for the Court to consider after a verdict, if there is a verdict of guilty.

I read the theft part because there must be a theft before there can be a charge of receiving stolen goods with knowledge they are stolen.

But Mr. Alfano is not charged with having any part in the theft of these goods. It is a charge of receiving, possessing stolen goods.

There are four elements of the crime as we call them, that must be established by the Government beyond a reasonable doubt in order to justify a conviction:

First, that the defendant either received or possessed the airline tickets specified in the indictment.

Second, that those airline tickets set forth in each count are worth in excess of $100.

Third, that the airline tickets were in fact stolen from interstate commerce; and

Fourth, at the time of receipt or possession of these tickets, the defendant, Lawrence Alfano, had knowledge that the specific airline tickets were in fact stolen.

The first element, possession, doesn't require that the Government prove that they were all in Mr. Alfano's hand at any one time. Proof that the defendant possessed something can be established by either actual physical possession or what the law calls constructive possession.

Physical possession is just what it means, having it for something and holding it actually in your hands or where youcan touch it.

Constructive possession means that a person has present ability to control the property, to be able to direct where it shouldgo or what should be done with it.

So if Mr. Alfano directed the tickets to be turned over to his children or his wife that could constitute constructive possession and satisfy the first requirement which you have to find. That is for you to determine from the evidence.

The second question is the $100 value. You can find that the tickets are worth the amount that is shown on the face of the ticket. There was some argument the tickets are worth less until they're filled out. Therefore they are not worth $100. There is a provision in the statute for a lesser penalty if the amount of goods involved does not exceed $100. So that would constitute what we call a lesser included offense and if, under the indictment, if you find there was possession of stolen airline tickets, knowing they were stolen, you could still find that it was not worth $100, but it was worth less than $100. But that, again, is your function in deciding the facts.

That they were stolen from interstate commerce is a further element. It's not necessary the defendant have any part in the theft. Only that the tickets have been stolen. You can infer the fact that the tickets were stolen from the fact they did not get to their destination. They were traveling from Tennessee to New Jersey. That is interstate commerce and goods remain in commerce until they reach the ultimate consignee. So they must have been stolen before they got into the hands of the Bayonne Travel, and you can find they were stolen while they were still in interstate commerce.

The question of theft has not been seriously disputed, but it still is an issue. If you find they disappeared in some other way other than by being stolen, that is within your province.

The basic problem you will have, however, is determining whether the defendant at the time he possessed these tickets knew they were stolen. There is one rule that applies in this case. That is that possession of stolen property shortly after it was stolen without a reasonable explanation for the possession permits the inference that the defendant knew that the property was stolen. You do not have to draw that inference. Bear in mind the defendant does not have to produce any evidence. He can explain it in some other way without testifying. You can determine what the period is that justifies the inference here that it may have been from two or three months between the theft and theuse and possession of the tickets. You can decide whether that is a sufficiently recent theft to justify the inference the one who possessed them must have known they were stolen.

Knowledge involves a state of mind on the part of the defendant. The burden is on the prosecution to prove the state of mind.

A person doesn't knowingly do a wrongful act if the act results from a mistake or any other innocent cause. Here, there is no direct evidence that Mr. Alfano knew that the tickets were stolen, but there is circumstantial evidence from which you can infer that knowledge or you can refuse to draw that inference. I have described, then, there is also a rule that avoiding knowledge is equivalent of knowledge.

In other words, if a man knows facts which are sufficient to create a suspicion that the property has been stolen he cannot close his eyes to it. If he recklessly refuses to look into the fact or make inquiries that a reasonable man would make you can determine that this was equivalent of actual knowledge.

This is not a necessary inference. You can consider whether there is a reasonable doubt under all the circumstances that the defendant knew or recklessly refrained from finding out whether the tickets were stolen.

The Government has to prove each one of these four elements that I have just described beyond a reasonable doubt. You cannot infer the existence of one element from the proof of the other three. If any element has not been proved beyond a reasonable doubt then you must acquit the defendant.

Now I come to the question of evaluating evidence. That includes determining the credibility of testimony which is prime function of a jury. There are two types of evidence that we describe in the normal criminal case. One is circumstantial evidence and the other is direct evidence.

Mr. Cunningham has given you an illustration of circumstantial evidence. We have very little direct evidence. I don't know of any direct evidence on the subject of knowledge.

Eyewitness testimony is direct evidence. Circumstantial evidence is proof of a chain of circumstances that logically points to the existence or non-existence of a certain fact. Generally, the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence to establish guilt need not exclude every reasonable hypothesis of innocence. It is only necessary that the jury be satisfied with the defendant's guilt beyond a reasonable doubt on the basis of all the evidence in the case, both direct and circumstantial.

Circumstantial evidence alone may be sufficient to convict if you find a defendant guilty beyond a reasonable doubt on all the evidence in the case.

When you analyze the evidence you can draw reasonable inferences because from your own common sense and your own general experience from facts that you find were proved. You are not confined to the bare testimony or the bare bones of the testimony or the exhibits, but you can't just speculate or guess. You can't fill in any gap in the Government's evidence unless it's based on a reasonable inference from the facts that have been proved.

When you weigh the testimony of a witness you can consider the relationship of the witness to the Government and to the defendant. Their bias or interest in the outcome of the case, if any. Their manner while testifying. Their candor and intelligence as you have observed it. You can consider the extent to which any testimony has been corroborated or contradicted by other credible evidence. Inconsistencies within the testimony of any witness, either on direct or cross-examination, if there is anything untrue that has been stated by a witness, you can accept that part you believe is true and disregard the part that is not. When you find inconsistencies within the testimony of a witness or between one witness and another. Similarly you can either disregard the testimony or pick and choose what sounds true and what is not true.

Bear in mind whether the inconsistency is on a basic matter or whether they are on minor details.

There is no requirement that the Government produce every witness who might be able to testify. You are to consider simply the evidence that is before you, whether the case has been proved or whether a reasonable doubt remains. And of course the issue doesn't depend on how many witnesses either side brought. It depends on the quality of the testimony and not the quantity. Insofar as any testimony was excluded you are not to guess what it would have been. Again, you are to decide the case only on what came before you and we made a couple of remarks and you should not consider pleasantries. Keep us out of your mind.

I am not going to comment at length on the evidence because you have heard from counsel about it and although it has been a week trial it has been a short number of hours you actually spent listening to testimony. But, I think a little attempt at an objective view of it may be helpful.

I think there is no serious dispute that Mr. Alfano did sell tickets at a discount. The question is whether he believed, whether he knew that they were stolen or shut his eyes. You have a variety of circumstantial evidence that you could use in that connection. You have testimony that the average person couldn't tell from looking at the tickets that they were stolen. You have the fact that Mr. Cunningham mentioned that the price at which the tickets were being sold was a different price from that that was stated on the face of the ticket which is one of the circumstances to consider in determining what Mr. Alfano knew or whether he was reckless in not finding out more than he did. If he really believed in good faith that Mike got the tickets from Charley who got them from the travel agent that they were discounted tickets or travel agent discount and they were NOT stolen, he's not charged with cheating a travel agent, but if he didn't care where they came from and recklessly refused to inquire, you can find him guilty.

Miss Varisco testified that she believed that these were discounted tickets from the travel agent. She was a customer. You can believe her testimony that that is justification for having bought the tickets. It does not necessarily follow Mr. Alfano knew or believed they were travel agent tickets because that is what he told the ultimate customer. Youcan find on all the facts what he actually knew using the circumstances that you have heard in order to try to look into his mind.

With respect to the taped conversations in August, you can use that as an inference as to what he knew in June and July. But the inference back from something that occurred later is not as strong an inference than from something that came before. So it is not as strong evidence as would be had he had conversations prior to the actual use of the tickets.

You can consider that in relation to your determination of what weight to give the taped conversation.

There is a lot more to that I could say but I think your memories are good. I don't want you to think that the parts I have described are the only pertinent parts of the evidence or that I have indicated any opinion as to whether Mr. Alfano is guilty or not guilty.

You can consider all parts of the evidence. You are the judges of the facts. Nothing that counsel and nothing that I have said prevents you from making your own decision about the facts on your own recollection of the evidence and apply it to the law as I have set it forth.

Now a few words about reaching a verdict: Your verdict must be unanimous on each count. That means all of you have to agree. It is wise to discuss the evidence rather fully before taking even a tentative vote so nobody jumps to a hasty conclusion before he has heard the entire case. You have to follow any instructions on the law, but you are the sole judges of the facts. If you want some testimony repeated you can hand a note to the marshal and ask for that to be done. I will get the reporter--find who was here at the time and find it and get counsel together and have it read to you.

If you want to hear the tape you can request that. If you want to look at any of the exhibits, you can ask for them and they will be sent in to you to look at. When you go to the jury room, Mrs. Dellanueva, she will act as your Foreman. She will try to make sure that everyone has a chance to talk and not everyone talks at one time. Review it quite fully. During your deliberations you should assume the attitude of judges and not partisans. In that way you will be making your contribution to the administration of justice.

You should report a verdict on both counts. You can find a defendant guilty on one and not guilty on the other. Or guilty on both or not guilty on both counts.

When you have reached a verdict you should give the marshal a note simply saying you have reached a verdict and when you are in court, Miss Dellanueva, you will report the verdict orally and either party can have the jury polled. That is, we call upon each person to say whether it is in fact his or her verdict, so we will know it is in fact unanimous.

When you determine guilt or innocence you shouldn't give any consideration to the manner of punishment. This matter is exclusively at the discretion of the Judge. If the defendant is found guilty, while there is a lesser punishment of the tickets are worth less than $100. You should consider whether or not the Government has proven they were worth more than $100 and not to compromise or attempt to alleviate the penalty that the law provides.

There will be marshals outside the jury room to let me know if you have a question.

While you are deliberating you should exchange views with each other, listen to each other respectfully. Don't hesitate to change your opinion if your attention is called to something that you ordinarily had not thought of or given enough weight to. But don't give up an opinion that you really believe in because more people are against you than for you. The verdict must be the verdict of twelve jurors exercising their individual conscientious determination.

I will plan on having lunch between 1:00 and 2:00 and I hope your lunch will arrive here. If there is a question that you have earlier than one o'clock I will be here glad to hear them. I hope you will be able to decide the case before the end of the day so I won't have to decide to keep you at night.

I will just wind up by saying your oaths that you took when you were sworn as jurors sum up your duties: "Without fear or favor to any man you will fairly try the issues in this case between the parties according to the evidence which you have heard and seen and the laws of the United States."

Thank you for your attention. Please go to the jury room. I will excuse the alternate jurors at this time. You may go back downstairs.

Please swear in the marshals.

(Whereupon, the Clerk of the Court swore in marshals.)

THE COURT: The marshals have the official responsibility to see nobody intrudes on your deliberations. It is a long tradition that goes back to English law which American law is founded on. Something that was not provided under English law, it provides your meals. In early England the jurors were kept without food or fire until they reached a verdict.

Please taken them into the jury room now.

(Jury excused.)

THE COURT: Any exceptions, Mr. Cunningham?

MR. CUNNINGHAM: No, your Honor.

MR. ROSNER: Your Honor, --

THE COURT: Yes, Mr. Rosner?

MR. ROSNER: Your Honor, I do respectfully except to your Honor pointing out certain aspects in the instructions that refer directly in one or two places and indirectly in others as to the defendant selling tickets.

I think at one point your Honor said that there is no serious dispute that Mr. Alfano sold tickets at a discount. I think that compounds my exception to Mr. Cunningham's summation, as well as the reference to the selling aspect.

THE COURT: I will correct it.

MR. ROSNER: As well as the reference to the selling aspect, this section is 659 and with respect to your Honor's ruling on recent stolen goods I think it appropriate that the Court should instruct the jury as to a standard to be applied as to recent possession.

THE COURT: What standard?

MR. ROSNER: I have been trying to find one.

THE COURT: There isn't one. It is for the jury to determine.

MR. ROSNER: It's a standard under all the circumstances.

THE COURT: I think that is adequately covered.

MR. ROSNER: In addition, I would request the Court to instruct the jury on possession of recently stolen goods. It does not cast any burden on the defendant whatsoever by way of explanation or otherwise. It is merely a permissive conclusion that they can come to.

THE COURT: I covered that adequately. You haveno obligation to put in any testimony.

MR. ROSNER: Finally, I would except to your Honor's instructions on reckless avoidance of knowledge. In light of the Court of Appeals decision in U.S. v. Fields, 466, where the Court said that the Government did --

THE COURT: Get me the book.

MR. ROSNER: The Government did have to prove that the defendant actually knew the property was stolen and it was not sufficient on the evidence only to prove such knowledge, which I think the reckless avoidance violates --

THE COURT: I will get the case on which you base a reckless avoidance, which is the words of the Court of Appeals in a different panel problem.

MR. CUNNINGHAM: I believe that case was United States v. Larry Vega and United States v. Jolly.

THE COURT: Your point on knowledge, it must be actual knowledge.

MR. ROSNER: That's what the Court said. It merely tended to prove.

THE COURT: I didn't use the words tend to prove.

(continued next page)

MR. ROSNER: I am aware of that, your Honor. But I think the instructions you gave on reckless avoidance carry the impression to a lay jury, if they do to me I would assume to a lay jury, that the Government doesn't have to prove knowledge. It is sufficient if it tends to, by the reckless avoidance --

THE COURT: I will check that. Are all the exhibits on the Clerk's desk?

MR. CUNNINGHAM: They are.

THE COURT: Will you put them here? I am starting another case, but I think counsel should be around, but it is all right for me to send in the exhibits to the jury on a request without re-assembling counsel?

MR. CUNNINGHAM: I have no problem with it.

MR. ROSNER: I have no objection as long as they are exhibits in evidence. I think some are and some aren't.

THE COURT: Nothing that is for identification should go in.

MR. CUNNINGHAM: Your Honor, the only thing I would say, the grand jury testimony of Mr. Alfano, which cannot be sent into the jury room because there are redactions on it. It would be fairly difficult to send it into the jury. I think it would have to be read back to the jury.

THE COURT: I have that on the bench.

MR. ROSNER:There are the Government's exhibits from the Airline Transportation Association. I believe it's Exhibit 17 regarding the Bayonne Travel Agency. An exception was taken to the third paragraph with reference to the other bulletin.

THE COURT: Yes.

MR. CUNNINGHAM: The bulletins have been redacted and other portion put back in.

THE COURT: What about it, Mr. Rosner?

MR. ROSNER: Again, your Honor, I except. There is no foundation that it was admitted after subsequent evidence and your Honor overruled my objection still stands at the subsequent evidence.

At your Honor's discretion and/or judgment, you indicated that the redacted portion should go back in. I will obviously abide by that.

THE COURT: I don't see any harm in leaving it in.

MR. CUNNINGHAM: I don't, either.

THE COURT: Get the exhibits ready.

I have the case now, gentlemen. United States v. Jacob in 475 F. 2d.

The Court of Appeals approved the Court's charge which said if you find the defendant acted with reckless disregard of whether the bills were stolen with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied until the defendant actually believed that they were stolen.

MR. CUNNINGHAM: They also cite the Bailer case, don't they?

THE COURT: Well, they cite a lot of cases in this Jacobs case. This is the Holler case.

MR. CUNNINGHAM: Yes.

THE COURT: I am not sure. This goes on to say that knowledge is established if the defendant was aware of a high probability that they were stolen. Unless he actually believed they were stolen.

MR. ROSNER: We may have to ask them to resolve the conflict.

THE COURT: Do you want me to give a supplemental charge on it?

MR. ROSNER: I am not sure which one your Honor would give.

THE COURT: I'll use the Jacobs charge.

MR. ROSNER: I would ask if your Honor does give the supplemental charge on the language that your Honor originally read from the decision, a conscious purpose to remain ignorant. I would ask your Honor as well to instruct them that the Government must prove that the defendant knew that the property was stolen and it's not sufficient that the evidence only tended to prove such knowledge.

THE COURT: I will put that in. Bring them in.

MR. CUNNINGHAM: I would ask you give the Jacobs charge in there as far as the last case came down to the Court of Appeals in United States v. Bright. I don't have the cite. Some time over the summer I was talking about the necessity for a balanced charge. I think that would be appropriate right there.

THE COURT: Yes.

(Jury enters box.)

THE COURT: Ladies and gentlemen, I have been asked to make supplements to the charge, one correction.

If I said that there is no real dispute that the defendant was selling tickets that had in fact been stolen I misspoke myself.

The charge is that he received or had possession of them and that's all that is involved in the case. These are tickets involved in the indictment, that he and his family used. So he's not charged with sale. He's charged with either receiving or having them in his possession with knowledge that they were stolen. With respect to the wording of knowledge, I'll use the exact language that the Court of Appeals has approved in another case dealing with stolen property.

"Guilty knowledge cannot be established be demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary the Government prove to a certainty that the defendant knew the tickets were stolen. Such knowledge is established if the defendant was aware of a high probability that they were stolen unless he actually believed they NOT were stolen. Knowledge that goods have been stolen my be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact."

The element of knowledge may be satisfied by proof that the defendant deliberately closed his eyes as to what otherwise would have been obvious to him, thus if you find that the defendant acted with reckless disregard of whether the tickets were stolen and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed they were stolen."

When I say reckless disregard, I don't mean the facts that tended toward showing that they were stolen. But of facts that would indicate to a person of reasonable intelligence that he should make an inquiry as to whether they were stolen and the same court says, "A purchase at a substantial discount price permits an inference the parties in the transaction knew of the illicit character. Also the entire conduct of the defendant at or near the time the transactions are alleged to have been committed." I hope with that you will be able to make a decision. You can go back to the jury room.

(Whereupon, the jury returned to their deliberations at 11:50 A.M.)

THE COURT: Yes?

MR. ROSNER: Where should we stay, your Honor?

THE COURT: Sit in the audience or in the witness room across the hall.

MR. ROSNER: Does your Honor have any objection to my going downstairs to speak to another Assistant?

THE COURT: No. Just so you are available on five minutes' notice.

MR. ROSNER: You may have to send the marshals through the building to find me.

THE COURT: If you are going to be very long at anyplace leave your number so we can call you.

(Whereupon, the Court recessed at 11:50 A.M.)

(Whereupon, at 12:00 o'clock the Court received a note from the jury.)

THE COURT: The jury asked for the indictment. We sent in the other items. I don't believe the indictment can be sent in without the consent of the defendant. I have told them several times it simply states the issues. It has the name and number of tickets.

What is your view on it?

MR. CUNNINGHAM: Frankly, I have never faced this before.

MR. ROSNER: Do you have an extra copy of one of those things or is it the superseding one, shouldn't it be on there?

MR. CUNNINGHAM: They don't know what that means. If the Court does not wish to send it in, I have no feeling on it one way or the other. Maybe you should inquire of the jury what information they want from it.

MR. ROSNER: Well, for the practical matter --

THE COURT: I frequently send it in if both sides consent. Sometimes I call them out and tell them it is simply the charge. I think they have been told that several times.

MR. ROSNER: I'm sure they have. I have no objection if your Honor wants to send it in.

THE COURT: Let it go in.

THE CLERK: Jury note marked Court Exhibit 1.

(Whereupon, the Court recessed.)

(Whereupon, the Court resumed at one o'clock.)

(Jury not present.)

THE COURT: Will you mark this Court Exhibit 2?

THE CLERK: Jury note marked Court Exhibit 2.

(So marked.)

THE COURT: Mr. Cunningham, I have a note from the jury asking for the defendant's grand jury testimony. Mr. Rosner has some reservations about that. Mr. Rosner says only the portions which have been read.

MR. CUNNINGHAM: That's correct, your Honor.

THE COURT: Although the exhibits have been marked in evidence. Since their lunch hasn't come yet we can get them in and read the parts that were read before.

MR. CUNNINGHAM: That will be fine.

MR. ROSNER: I think they want to take it in and go over it. If Mr. Cunningham starts to cut up that copy and send them portions instead of reading it to them --

MR. CUNNINGHAM: Well, by the time we make an extra copy and redact those portions --

THE COURT: My recollection is it didn't take very long to read.

MR. CUNNINGHAM: I think only ten minutes to read.

THE COURT: Let's bring in the jury.

MR. CUNNINGHAM: Your Honor, it's going to be fairly difficult.

MR. ROSNER: I have it all marked out.

MR. CUNNINGHAM: I know what was read, but I was wondering --

THE COURT: Let's see what they say.

(Whereupon, the jury returned from their deliberations at 1:07 p.m.)

(Jury enters box.)

THE COURT: Ladies and gentlemen, the grand jury testimony was read. Only part of it was read and I thought instead of sending it in to you I would have you listen to what was read before.

Will counsel come to the side bar for a minute?

(The following occurred at the side bar.)

MR. ROSNER: It would be easier from the minutes.

MR. CUNNINGHAM: I'll go along with that.

MR. ROSNER: This is a copy. They have black lines where it stops and starts. Here is the black, still black, still black--down to here. Perhaps we should have a paper clip. Then Mr. Cunningham picked up from my recollection on page 17, there and then here. This was excluded and then Mr. Cunningham picked up again on page 18 over to 19.

THE COURT: Yes.

MR. ROSNER: Picked up again on page 23. All 24, all of 25, 26, to page 27. Picked up on page 16, line 6. That was not included. Picking up again on page 31, line 24 over through line 8 on 32.

(The following occurred in open court.)

THE COURT: I'll read to you the portions that counsel agreed would go in before. The lunch hasn't come in yet so we can still take a few minutes.

(Whereupon, the Court read from the trial transcript of October 17, 1975, starting at page 181, line 21 to page 198, line 11.)

THE COURT: You may now withdraw to the jury room. I think the lunch is here.

(Jury excused at 1:25 p.m.)

(Whereupon, the Court recessed.)

(Whereupon, the Court resumed at 2:20 p.m.)

THE COURT: Bring in the jury. We have a verdict.

THE CLERK: Court Exhibit 3, jury note marked.

(Whereupon, the jury returned from their deliberations at 2:20 p.m.)

(Jury enters box.)

THE COURT: Madam Forelady, I have a note. You have reached a verdict. Would you please stand and announce your verdict.

THE FORELADY: Yes. We find the defendant guilty.

THE COURT: On both counts?

THE FORELADY: Yes.

THE COURT: Over a hundred dollar value?

THE FORELADY: Yes.

THE COURT: Will you please poll the jury, Mr. Clerk?

THE CLERK: Ladies and gentlemen of the jury: As the Court has received your verdict you say you find the defendant guilty as charged.

Madam Forelady, is that your verdict?

THE FORELADY: Yes.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE COURT: Thank you, ladies and gentlemen. You have done your duty. You are now free to talk about the case. You don't have to answer anyone's questions and you should not tell anybody how you went about reaching a verdict on your deliberations. Your deliberations are confidential.

I thank you again.

(Jury excused.)

THE COURT: Mr. Rosner, have you any motions?

MR. ROSNER: With the Court's permission I would like to reserve my motions until the time of sentencing.

THE COURT: All right.

Mr. Cunningham?

MR. CUNNINGHAM: Yes, your Honor. The defendant is out on a personal recognizance bond, $20,000.

MR. ROSNER: Five or ten?

MR. CUNNINGHAM: I know there is no actual physical attribution that has been put up for bail. The fact that he has been found guilty in this court and he also has five or six indictments in the state court which are pending, the mysterious disappearance of witnesses throughout the course of the trial, the apparent Fifth Amendment privilege being invoked by the defendant, I would ask that bail be set in this case.

THE COURT: What amount do you suggest?

MR. CUNNINGHAM: I would ask for 20,000 cash.

THE COURT: $20,000 bail?

MR. CUNNINGHAM: That's right.

THE COURT: I suppose, Mr. Rosner, in view of the failure of three witnesses, who are evidently acquaintances of Mr. Alfano to show up, that is a proper requirement.

MR. ROSNER: Your Honor, I would submit at least based on the record thus far there is no indication from which either the Government or the Court could draw an inference it was necessarily at Mr. Alfano's insistence. I think one of the witnesses appeared here on Wednesday. I think it was Sampogne.

MR. CUNNINGHAM: That's correct, your Honor.

MR. ROSNER: He was present at the end of the day and he asked whether he should return and both Mr. Alfano and I told him he was required to return the next day, even though the Court didn't instruct him to. I think that carries a little weight. It is a natural inclinaton on the part of the Government to attribute these events to Mr. Alfano. But I don't think it is supported by the record.

Second of all, Mr. Alfano was born here, he has lived in New York all his life. He is married and he has three children. He has an Honorable Discharge and he's never been convicted of a crime. He has always appeared and every time the Court required him, he stayed outside the courtroom during the entire deliberations.

Then, imposing a bail in the sum of $20,000 would have no purpose other than to punish him in advance of imposition of sentence.

THE COURT: Well, if I remand him without bail I have to give reasons. But I think there is an adequate reason for $20,000 bail in the events that have taken place during the trial.

MR. ROSNER: I would think, your Honor, a $20,000 bail bond would be tantamount to no bail. I can understand the Government's request, but I think $20,000, particularly as your Honor has heard the evidence of his financial means, $20,000 is just unreasonably excessive.

THE COURT: I haven't heard any sworn evidence of financial means.

MR. CUNNINGHAM: $150 a week. That's all we heard.

THE COURT: No, I am going to fix $20,000 bail, cash or security bond. The Probation Department is here. Let them begin the pre-sentence report and if the defendant is in custody, make it as quickly as you can. You will be notified, Mr. Rosner, of the date.

I should have told the jury that Mr. Alfano had a skillful and thoroughly prepared counsel.

THE COURT: Thank you, your Honor.

(Whereupon, proceedings concluded.)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

against :

LAWRENCE ALFANO : 75 CR 298

Defendant :

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United States Courthouse
Brooklyn, New York

December 5, 1975
12:00 noon

Before:

HONORABLE ORRIN G. JUDD,

U. S. D. J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: PAUL BERGMAN, Esq.
United States Attorney

JONATHAN ROSNER, Esq.
Attorney for Defendant

THE COURT: Mr. Rosner, you've had an opportunity to read the presentence report.

MR. ROSNER: Yes.

THE COURT: Do you have any criticisms to make with respect to it?

MR. ROSNER: No criticisms. I would like to be heard with a couple of observations at the appropriate time.

THE COURT: Let me see what my notes are about the presentence report.

(Pause)

THE COURT: I see he hadn't told his parents about the case.

MR. ROSNER: Pardon?

THE COURT: Until just recently.

MR. ROSNER: That's correct, your Honor. I believe the presentence report indicates, and I have confirmed it, Mr. Alfano's wife did not know that he was on trial when he was on trial. I think the presentence report fairly indicates that insofar as the probation officer was concerned, he concluded that Mr. Alfano's purpose was in substance to protect his family from the concern that they would naturally have as a consequence of the indictment and the trial.

THE COURT: You can add anything you want.

MR. ROSNER: I would, before I make any comments, your Honor, since your Honor permitted me to reserve motions until after the verdict, I would like to make the appropriate motions at this time merely to protect the record.

THE COURT: Yes. I felt the jury's verdict was founded on adequate evidence. I don't think there's any basis for setting it aside. I'll deny your motion.

MR. ROSNER: Thank you, your Honor.

With respect to the sentence, as I indicated, I have read the presentence report. I have indicated to Mr. Alfano that I believe it is reasonably accurate based upon the information that I have. The one area where I would perhaps have some disagreement, here it's a disagreement over interpretation more than anything else, it's the question of knowledge which is so relevant during the course of the trail itself.

I would submit that in the final analysis the only person who was living who could indicate knowledge in fact or not is the defendant himself. Obviously the rules of evidence clearly support that conclusion, since knowledge obviously can only be proved by circumstantial evidence absent outright confession.

Mr. Alfano has persisted in my conversations with him since I commenced representation of him, he denied at the time that he possessed these tickets, had no knowledge in fact they were stolen. In fact, he paid good money for the tickets that he purchased or obtained, good money from friends of his for whom he placed orders for these tickets.

Beyond that, I would just like to make the following observations, your Honor. As the presentence report indicates, until the verdict in this matter, the defendant had not previously been convicted of any crime.

The presentence report does indicate properly that while he was in the Service he was the subject of charges which were subsequently dismissed.

As your Honor knows, he has presently pending charges in state court which are legally unrelated--

THE COURT: Is that the trial going on before Judge Mollen?

MR. ROSNER: Hearing on a motion to suppress, your Honor.

THE COURT: I think Judge Mollen called me yesterday, because he had the trial going on. I said I would hold the matter until 12:30 to let as much of the trial go ahead as possible.

MR. ROSNER: Those charges, as I understand it, are really unrelated to the charges before your Honor upon which Mr. Alfano was convicted, although they arise out of the electronic surveillance in the Crossroads Bar.

But for the conviction before your Honor on which you're about to impose sentence, the defendant has, at least at this juncture, not previously been convicted of a crime.

I would like to advert to a couple of other things. The presentence report appropriately indicates, your Honor, that -- I'll paraphrase it -- the defendant Alfano's involvement in this stolen airline ticket matter, as the presentence report indicates, is substantially less extensive than, as an example, a man named Gallo, who apparently was the source of the tickets indirectly, the source of the tickets Mr. Alfano has been convicted of possessing.

Mr. Gallo received a one-year sentence, five years probation, $2500 fine.

A Mr. Howell was indicted for theft of these tickets, or the tickets involved in this whole batch.

THE COURT: I think there were some special circumstances involved in the Gallo case.

MR. ROSNER: Mr. Howell was indicted for the theft. There was a subsequent superseding information for misprision of felony to which Mr. Howell was convicted. He received a one-year suspended sentence.

A Mr. Cascio, concerning whom there was testimony on trial, if your Honor recalls, he was going to be the source of the tickets for one of the witnesses on trial until there was a problem with money, he was as well originally indicted for the theft of the tickets, possession of the tickets. There was a superseding information charging him with misprision or concealment. He received a three-year suspended sentence and probation.

A Robert Donnovan was indicted for theft, posesssion of the tickets. Those charges were dismissed and Mr. Lauria, concerning whom I think there was testimony on trial, Michael Lauria, if your Honor will recall, was indicted and convicted for conspiracy to possess and use the airline tickets, was convicted, received a six-month prison term, and three-hear period of probation.

I think in light of those precedents arising out of this series of transactions in which the defendant was caught up, I would ask your Honor to be merciful and reasonable and understanding with respect to the sentence your Honor imposes.

THE COURT: Mr. Bergman, you didn't try the case. Have you any comment?

MR. BERGMAN: As far as the facts and circumstances, I'll have to defer to your Honor's knowledge, I suppose, of all the cases which have been prosecuted as well as the background of all the previous defendants who have been sentenced.

I would just like to state it for the record, the defendant should know that in addition to such knowledge as his lawyer may have gained from the probation report, that he himself has a right to read the presentence report that has been prepared in this case.

THE COURT. There it is, we are past December 1.

MR. ROSNER: I forgot about that, your Honor.

THE COURT: Mr. Alfano, do you want to say anything yourself?

THE DEFENDANT: No.

THE COURT: I meant to get out the Gallo papers before sentencing. Maybe my law clerk can get them for me.

(Recess)

THE COURT: In Gallo, my original recommendation had been four years, which I reduced at the time of sentence primarily because Mr.Gallo was not connected with the Gallo family. He later had moved to California, tried to set himself up in a new life. I didn't want to interrupt it too long. I think it was a light sentence, and it was bolstered by a five-year suspended sentence on one of the other counts.

The other cases that you mentioned were people who were not involved in as many tickets as appeared to be the case with Mr. Alfano.

MR. ROSNER: If I might, your Honor, according to the presentence report, at most Mr. Alfano, according to the presentence report was involved with thirty such tickets. Obviously, the Government approved the five the jury returned the verdict on.

THE COURT: Other similar acts which couldn't be proved because the witnesses didn't come.

MR. ROSNER: According to the presentence report, Mr. Gallo was involved in 2,000 and 7,000. There's no occasion Mr. Alfano was directly involved with Mr. Gallo. In other words, Gallo was the source.

THE COURT: Mr. Gallo was facing some other investigations out on the Coast. Mr. Alfano is facing some others.

MR. ROSNER: Yes, your Honor.

THE COURT: The guidelines for an adult on this, according to present provisions of the Board of Parole are from twelve to sixteen months, which also indicates the sentence on Gallo was on the low side.

I'll impose a sentence of two years, concurrent on both counts, and $1,000 fine on Count 1.

Mr. Alfano, you have a right of appeal. Mr. Rosner has an obligation to represent you on appeal unless and until he's relieved by the Court of Appeals. You have ten days within which to file the notice of appeal.

I promised Judge Mollen yesterday I was

not going to have Mr. Alfano confined during the present trial. Is there any objection to continuing bail?

MR. BERGMAN: No objection.

MR. ROSNER: The bail is $20,000 bond that your Honor fixed at the conclusion of the trial upon the jury verdict. I would specifically submit that would be adequate after the disposition in the Court of Appeals.

THE COURT: That will be continued.

MR. BERGMAN: One further question: I would like to know from counsel what the state of the transcripts are in this case.

MR. ROSNER: I have not myself found that out or ordered them as yet since I did not know prior to today whether the defendant intended to prosecute an appeal.

On the other hand, the way you did this morning, I believe it was somebody from the reporters' office indicated they were in the process anyway.

THE COURT: By the time the notice of appeal is filed, if you order them, the clerk will put that in the form.

MR. ROSNER: I received a form similar to that which I started to fill out this morning which I will complete, send to the Clerk on Monday or Tuesday of next week.

MR. BERGMAN: Might we have leave to request additional bail in the event the transcript is not ordered within the two-week period?

MR. ROSNER: It will have to be ordered when I file the notice of appeal, since there is a provision on the new form for that.

THE COURT: That's an academic matter. You can make another motion if you have to.

A 563

76-1004

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LAWRENCE ALFANO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

JONATHAN L. ROSNER
Attorney for Defendant-Appellant
6 East 43rd Street
New York, New York 10017

(5344B)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1004

UNITED STATES OF AMERICA,

Appellee,

-v-

LAWRENCE ALFANO,

Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

Lawrence Alfano appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on December 5, 1975 after trial before Honorable Orrin G. Judd, United States District Judge, and a Jury, for two substantive violations of Title 18, United States Code, Section 659.

Indictment 74 Cr. 818 was filed in the United

States District Court for the Eastern District of New York on December 26, 1974, and charged the Appellant, in two counts, with the knowing possession of five airline tickets valued in excess of One Hundred ($100.) Dollars which were stolen from a shipment moving in interstate commerce, in violation of Title 18, United States Code, Section 659. On April 15, 1975, Indictment 75 Cr. 298 was filed in the United States District Court, superceding Indictment 74 Cr. 818, and charged the Appellant with the same two crimes.

Trial on Indictment 75 Cr. 298 commenced in the United States District Court for the Eastern District of New York on October 15, 1975, before Honorable Orrin G. Judd, United States District Judge, and a Jury. On October 22, 1975, the Jury returned a verdict of "Guilty" on each of the two counts contained in the indictment. On December 5, 1975, the Appellant was sentenced on the verdict of the Jury to Two (2) Years imprisonment and a fine of One Thousand ($1,000.) Dollars on Count One and Two (2) Years imprisonment on Count Two, the terms of imprisonment to run concurrently each with the other.

Questions Presented

1. Where an accused is charged with the knowing possession of goods stolen from interstate commerce

may proof of the essential elements of the crimes be furnished solely by documents received in evidence without an adequate foundation?

2. Is evidence of subsequent similar criminal acts admissible to establish knowledge of the fact of theft at the time of the earlier possession of the tickets?

The Statement of Facts that follows is set forth in a light most favorable to the Government, as is appropriate, and is predicated virtually entirely upon the documents received in evidence during the trial since no one of the witnesses offered testimony predicated on personal knowledge of any of the facts relevant to the issues raised by the indictment.

Statement of Facts

Rand McNally & Company is engaged in the manufacture of blank ticket stock for airlines and other carriers and has a plant in Nashville, Tennessee for production of those tickets. (A-13 - A-14).*

On April 12, 1973, Greenwald Travel Service, located in Clifton, New Jersey, requisitioned blank ticket stock from Rand McNally & Company through the Air Traffic Conference of America. (E-11) On May 11, 1973, Bayonne Travel Service, located in Bayonne, New Jersey, made a similar request for blank ticket stock of Rand McNally & Company. (E-6)

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* References with prefix "A-" are to the Appendix. References with prefix "E-" are to the Exhibits.

The blank ticket stock requisitioned by Greenwald Travel Service was received by Wings & Wheels Express, Inc., an air freight forwarder, from Rand McNally & Company in Nashville, Tennessee, on April 24th (E-12) and the blank ticket stock requisitioned by Bayonne Travel Service was received by Wings & Wheels Express, Inc. from Rand McNally & Company in Nashville on or about May 25th. (E-7). In each instance, Wings & Wheels Express, Inc. seemingly delivered the shipment to Allegheny Airlines, Inc. as air freight, the initial shipment delivered on April 24, 1973 consigned to Wings & Wheels in Newark, New Jersey, and the later shipment delivered on May 23, 1973 consigned to Wings & Wheels in Newark, New Jersey. (E-14, E-24, E-25; E-8, E-9, E-15).

On June 5, 1973, Wings & Wheels, Inc. reported that the first shipment, or a part of the same, had been "stolen from Wings & Wheels Newark Dock morning of April 26, 1973" and "notified all truckers who were in to [pick up] freight that day also called all travels [sic] agency that we had [delivered] to from same shipper [freight] possible had been [delivered] to wrong [consignee]." (E-26)

Two days later, on June 7, 1973, Wings & Wheels, Inc. completed a report indicating that a part of the second shipment had disappeared on May 29, 1973, and that that portion of the shipment "was [picked up] and in the truck morning of May 25, 1973" but the "trucker notified Wings & Wheels office May 29, 1973 stating he could not locate [freight] for [delivery]". (E-10)

On June 24, 1973, two of the numbered tickets contained in the first shipment,--validated on May 5, 1973 by Central Tours, a travel agency in New York City, for round trip passage between New York and Fort Lauderdale, Florida, issued in the names of "Mrs. R. Alfano" and "Mr. R. Alfano",--were presented for passage on Eastern Airlines. (E-1, E-2) Approximately one month later, on July 23, 1973, three of the numbered tickets contained in the second shipment,--validated June 25, 1973 by Grimes Travel Agency, another travel agency in New York City, for round trip passage between New York and Miami, Florida, issued in the names of "Mrs. V. Maltese", "Mr. G. Maltese" and "Mr. S. Maltese",--were presented for passage on National Airlines. (E-3, E-4, E-5).

On August 7, 1973, law enforcement officers, acting pursuant to state court orders, overheard and recorded a telephone conversation between the Appellant and a lady named "June" in which the participants discussed June's intended purchase of airline tickets at a discount from a man named "Mike" through a friend of hers named "Wally". (E-16, _et seq._) During that conversation the Appellant advised June to refrain from using "Wally" as the go-between, indicating that he was indebted to "Mike" the same person from whom the Appellant obtained discount airline tickets. June then asked the Appellant whether, if she "get[s] nailed" with the tickets, she would lose the money paid for them, to which the Appellant responded that "if you try for a refund . . . you lose the ticket" (E-21), and, reassuring her, stated that "just flying with them, you got nothing to sweat", indicating that he had "just [come] back myself, I took my whole family, and I would never do that if I didn't think it was sure". (E-21) As well, further reassuring June, the Appellant stated that he "sent Stevie, his family, everybody, and nobody had any problem." (E-21)

On February 24, 1974, the Appellant testified under oath before a Grand Jury sitting in the United States District Court for the Eastern District of New York (A-94 - A-95; A-116 - A-133). During that testimony, the Appellant acknowledged that he and his family had taken an airline trip to Florida in July, 1973, travelling to Fort Lauderdale using tickets which the Appellant purchased at a discount from one Michael Argondizzo. (A-117 - A-118, A-121) During his appearance before the Grand Jury the Appellant also acknowledged that he had obtained tickets for "Steve Moltese (phonetic)" and "Danny Kilgallon (phonetic)" through "Mike". (A-123 - A-124)

ARGUMENT

POINT I

VIRTUALLY ALL OF THE EVIDENCE SUSTAINING APPELLANT'S CONVICTION WAS RECEIVED WITHOUT PROPER FOUNDATION

The Government called five witnesses to prove the Appellant's guilt of the two crimes charged in the indictment,--Socrates Georgeades, Assistant Ticket Sales Manager for Rand McNally & Company (A-13); George Zackaroff, Day Supervisor for Wings & Wheels, Inc. (A-29 - A-30); Frank Scinta, an Investigator for the Air Transport Association, an airline trade association (A-37 - A-38); Elizabeth A. Ng Young, a Grand Jury Reporter (A-94); and Howard Brunn, Superintendant of Investigations for Eastern Airlines (A-101).

Not one of the witnesses called by the Government had any personal knowledge of the subject matter of their testimony.

Thus, for example, Socrates Georgeades, an employee of Rand McNally & Company, identified the five (5) tickets bottoming the two counts in the indictment (A-14, A-24), indicating that they were manufactured in the Rand McNally & Company Plant in Nashville, Tennessee, and identified other documents prepared by the Air Traffic Conference (A-17, A-25) or Wings & Wheels, Inc. (A-18, A-20, A-24), and was then permitted to testify that the documents received in evidence over objection as to lack of foundation (A-22 - A-24) fairly indicated "that the shipment left our plant in Nashville, Tennessee, was picked up by Wings & Wheels, shipped by Wings & Wheels to their Newark dock, received at the Newark dock and later--but never arrived at the travel agent, apparently the tickets were missing, if I can use that word, after they were received in Newark by Wings & Wheels." (A-22; A-25).

Similarly, George Zackaroff, an employee of Wings & Wheels, Inc., was simply shown documents, expressed his familiarity with them (A-32), fairly indicated he had no personal knowledge of the documents and was not the custodian of them (A-33), but was permitted to read from the documents (A-33 - A-35) and testify to his own conclusions from such reading that "they [the documents] represent documented proof that we had picked up a piece of freight . . . from Rand McNally and moved it through as being an air shipment [and] never arrived . . . . " (A-31 - A-33). Clearly, Mr. Zackaroff had absolutely no knowledge of the events described in the documents (A-33 - A-36) and was merely reading for emphasis those materials received in evidence over objection.

The identical procedure was followed in the examination of Frank Scinta, the investigator from the Air Traffic Conference, who was permitted to reiterate for the benefit of the jury the contents of those documents for which he offered no foundation (A-39) and was, as well, permitted to testify to the non-receipt of the tickets bottoming the two counts in the indictment, although the testimony was obviously hearsay. (A-41)

In virtually every instance an appropriate objection was voiced in respect of the hearsay nature of the evidence being proferred, including the absence of the requisite foundation for the documents. The rulings of the trial court reasonably indicate the absence of any reasonable exercise of judicial discretion in determining the objections:

> "THE COURT: This is a regular business report of yours, isn't it?" (A-20)
>
> * * *
>
> "MR. ROSNER: According to his

testimony the document is made out by Wings & Wheels. He works for Rand McNally. There couldn't be a foundation under the business records rule. He's not a custodian, has no knowledge of it.

"THE COURT: I'm certain Wings & Wheels is available." (A-21)

* * *

"MR. ROSNER: I don't think there's a proper foundation.

"THE COURT: Some of them require further foundation, but I'll receive them with further connection." (A-24 - A-25)

* * *

"Q Sir, did there come a time when you in your official capacity with the Air Transport Association learned that these tickets did not arrive at the Bayonne Travel Agency?

"A We received several phone calls from various airlines indicating--

"MR. ROSNER: Objection, unless the witness has personal knowledge. When he says 'We received,' is no indication--

"THE COURT: Sustained.

"MR. CUNNINGHAM: Might I have one moment.

"THE COURT: Yes.

(Pause)

"Q Do you know from your own knowledge as to whether or not these tickets arrived at the Bayonne Travel Agency?

"A I do.

"Q How did you find out these tickets did not arrive at the agency? What steps were taken when the tickets did not arrive?

"MR. ROSNER: Objection. Two questions here.

"THE COURT: Answer the second one first.

"THE WITNESS: Repeat it.

"Q What steps did you take in the normal course of events when you've been advised that tickets have not arrived at a travel agency?

"A We check with our office who controls the ticket requisitions, found out the signature copy of the ticket requisition, which is made by the travel agency had not been received. Then we contacted Rand McNally, found out the tickets had been shipped.
Then we contacted Wings & Wheels and found out that the tickets had been reported as missing." (A-40 - A-41)

* * *

"MR. ROSNER: Objection, move to strike all this testimony on the grounds it's all hearsay.

"THE COURT: I suppose we can bring in a bunch of witnesses to establish each step, but I'll overrule the objection." (A-42).

A careful examination of the testimonial evidence offered by the Government clearly indicates that the documents offered to establish the essential elements of the crimes charged in the indictment,--theft, interstate shipment, possession of stolen goods, and knowledge of theft at the time of possession,--were received in evidence without adequate testimonial foundation, and the witnesses were permitted, even invited, to repeat the contents of those documents, and extrapolate on the contents, as if each witness had personal knowledge of the recitals in those documents.

Rule 602, Federal Rules of Evidence, provides, *inter alia*, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter", a provision subsequently amended in the *Rules*, *supra* at Rule 802, *et seq.*, which simply excludes hearsay evidence. Rule 803(6) of the *Rules*, *supra*, excepts from that prohibition records "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the record. That exception is in accord with the statutory provision known as "The Federal Shopbook Entry Rule, 28 U.S.C. § 1732, the beneficent purpose of which has been observed to be "to avoid the necessity of producing the person who actually participated in the transaction and then tracing through witnesses every step", *United States v. Re*, 336 F.2d 306, 314 (2d Cir. 1964), *cert.den.*, 379 U.S. 904, the rationale underlying which is to "permit the admission of business memoranda which impart a circumstantial guarantee of trustworthiness. The test is one of reliability." *United States v. Hickey*, 360 F.2d 127, 143 (7th Cir. 1966).

To insure satisfaction of "[t]he test . . . of reliability", *ibid.*, federal courts have adopted a simple yet clear formula for the foundation governing admissibility of such documents:

> "[A]ny writing or record, made as a memorandum of any act, transaction, occurrence or event, *if made in the ordinary course of one's business and if it was the regular course of such business to make such record at the time or reasonably thereafter*, is admissible as evidence of the act, transaction, occurrence or event." *United States v. Rosenstein*, → See 474 F.2d 705, 710 (2d Cir. 1973)(Emphasis supplied).

That foundation must, as well, be laid by "someone who is sufficiently familiar with the business practice", *ibid.*, and "it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records." *J.Howard Smith, Inc. v. S.S. Maranon*, 501 → See F.2d 1275, 1278 (2d Cir. 1974).

In this instance, a criminal prosecution where the litigant's liberty was at stake, the prosecution made no effort to obtain the testimony of the custodian of the records and offered no preliminary testimony to establish that each declarant had familiarity with the business records of the company in whose employ he was. As well, there was not even the slightest effort to comply with the litany for laying the foundation for the records offered, _viz._, testimony that the record was made and kept in the ordinary course of business, that it was the ordinary course of business to make and keep such records, and that the records were made at or about the time of the event recorded. In fact, the trial court's response to objections as to this omission fairly conveyed its view that such objections were not appropriate, for it observed, _inter alia_, that "I suppose we can bring in a bunch of witnesses to establish each step, but I'll overrule the objection."* (A-42)

It is evident from the face of two crucial documents received in evidence against the Appellant that at least one salient requirement for satisfaction of the test of reliability was missing from those documents,--that the entry was made at or about the time of the event, act, transaction reflected in the record. The "Over - Short - Damage Report" of Wings & Wheels, Inc. is the only evidence offered by the prosecution to establish the fact of theft, with one report being offered to establish the fact of theft for each count. (E-10, E-26). The first shipment of tickets from Rand McNally & Company, apparently destined for Greenwald Travel Service in Clifton, New Jersey, left Rand McNally & Company on about April 24, 1973, and were shipped by Allegheny Airlines on or about April 26, 1973. (E-11, E-12, E-14, E-24, E-25) The second chipment of tickets, apparently destined for Bayonne Travel Agency in Bayonne, New Jersey, left Rand McNally & Co. on May 23, 1973 and were shipped by Allegheny Airlines on the same date. (E-6 - E-9, E-15). The first shipment must therefore have arrived on or about April 26, 1973 and the second shipment must have arrived on or about May 23, 1973. On June 5, 1973, the "Over - Short - Damage Report" covering the first shipment was apparently completed, stating that "carton stolen from Wings & Wheels Newark dock morning of April 26, 1973" (E-26), and two days later, on June 7, 1973, the report covering the second shipment was apparently completed, stating "trucker notified Wings & Wheels office May 29, 1973 stating he could not locate [freight] for delivery". (E-10). In each instance, the report offered to establish the fact of theft was completed more than one week after the alleged event, by an unknown person, and the document,--with damning language of theft,--was received without any foundation whatsoever.

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* The trial court's attitude towards evidentiary objections can best be gleaned from a ruling on an objection made by counsel for the Appellant as to evidence of other criminal acts. In overruling the objection, the trial court observed, "I don't think your objection is made in good faith. * * * * You're trying to hoodwink the jury." (A-83 - A-84).

While the so-called "Over - Short - Damage Reports" (E-10, E-26) are the most egregious examples of the absence of adequate foundation for admissibility of documents,--since they go to the heart of the matter to be proved,--virtually all of the documents received in evidence to establish the essential elements of theft and the interstate character of the shipment lacked adequate evidentiary foundation. Thus, the trial was nothing more than an appeal from a government filing cabinet with the Appellant deprived of challenging in any way the evidence on which the Jury returned its verdict.

POINT II

THE EVIDENCE OF SUBSEQUENT CRIMINAL ACTS BY APPELLANT TO ESTABLISH KNOWLEDGE OF THE FACT OF THEFT SHOULD NOT HAVE BEEN RECEIVED.

As previously suggested, the sole evidence of theft and the interstate character of the shipments came from documents received in evidence without adequate foundation, while the Appellant's own testimony before the Grand Jury furnished sufficient direct and circumstantial evidence of possession of the goods. (A-117 - A-125). However, crucial to a conviction for the crimes charged in the indictment is proof that at the time of possession the Appellant "actually knew" that the tickets were stolen property. United States v. Fields, 466 F.2d 119, 120 (2d

Cir. 1972). Doubtless, as this Court has observed,

> "[i]t has long been held that 'Possession of fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession . . . .'" United States v. Lefkowitz, 284 F.2d 310, 313 (2d Cir. 1960)(Emphasis supplied).

Here, assuming arguendo the admissibility of the "Short - Over - Damage Reports" (E-10, E-26) to establish the fact of theft, the thefts occurred on April 26, 1973 and May 25 - May 29, 1973 (see E-26 and E-10, respectively), and the proof of possession is the use of the tickets by two of Appellant's relatives on May 5, 1973 (E-1, E-2) and on June 25, 1973 (E-3 - E-5) by Steve Maltese. (A-117 - A-125). Perhaps fearful that the inference of knowledge from possession "of fruits of crime, recently after its commission", ibid., was attenuated or non-existent by the lapse of two weeks, the prosecution offered an eavesdropped telephone conversation to which Appellant was a party that occurred between one and one-half to three months after the possession of the tickets. (E-16 - E-23)(A-113, et seq.) Timely objection was made to the admissibility of that material where its sole relevance was on the issue of Appellant's knowledge of the fact of theft. (A-113 - A-114). Indeed, the trial court itself recognized that these subsequent criminal acts were offered solely for that purpose in observing that "I would suppose it's clearly admissible on knowledge". (A-113 - A-114).[*] The eavesdropped conversation received in evidence established Appellant's *subsequent* participation in transactions involving airline tickets from the same source as those contained in the indictment.

Few decisions in this area have troubled to make the distinction between *prior* and *subsequent* criminal acts and between proof of such similar acts when the issue is *knowledge*, on the one hand, and when the issues are *intent* and *motive*, on the other hand. Appellant respectfully submits that where, as here, the sole issue is knowledge,--in this case, knowledge of the fact of theft of the goods possessed,--evidence of subsequent criminal acts should not have been received in evidence.

Perhaps the best explication of the rationale underlying the distinctions that the Appellant would have this Court draw is set forth in the opinion in *Niederluecke v. United States*, 21 F.2d 511 (8th Cir. 1927), a case involving violation of the National Motor Vehicle Theft Act (18 U.S.C. §408) on November 16, 1925. The prosecution offered evidence of possession of another stolen car on December 7, 1925,--two weeks subsequent to the possession charged in the indictment,--to establish that at the time of the possession bottoming the charge in the indictment the accused had the requisite knowledge. In reversing a judgment of conviction, the Court stated, inter alia, "the later offense, being later in time, had no possible causal effect upon the commission of the former". Id. at 513. But axiomatically, a subsequent similar criminal act may well be admissible to evidence the intent with which an accused engaged in a prior criminal act for which he is on trial as, for example, where an accused uses the mails on successive occasions for the purpose of executing a scheme to defraud,--where his intent to defraud is essential to the first mailing for which he is on trial. However, subsequent knowledge, as a matter of logic, cannot by any feat of legerdemain relate back to establish knowledge at the time of a prior possession of goods which were in fact stolen. As another Court noted,

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[*] While the trial court included the issues of motive and intent as an apparent afterthought (A-114, lines 9-10), intent and motive are not relevant or essential elements of the two crimes contained in the indictment. As well, the two cases upon which the trial court relied in receiving the materials in evidence (A-113, lines 22-24) seemingly recognized the distinction which the Appellant seeks this Court to draw:

> "Proof of *later* similar acts . . . was admissible . . . in the trial court's discretion, *for the limited purpose of showing his willful intent and motive.*" *United States v. Diorio*, 451 F.2d 21, 23 (2d Cir. 1972) (*Per Curiam*), *cert.den.*, 405 U.S. 955 (Emphasis supplied)

> "knowledge is 'information as to a fact. The act of knowing; clear perception of the truth; firm belief; information.' While both intent and knowledge are recordations in the mental processes, intent is the 'design, resolve, or deter-

> mination' with which a person acts. While knowledge is concerned with a fact that has happened or occurred, it is information as to such fact. In other words, while one may have an intention to do something in the future, one cannot have knowledge of a fact at a certain time through some happening or occurrence that may take place in the future." Witters v. United States, 106 F.2d 837, 840 (D.C.Cir. 1939).

See, also, Roe v. United States, 316 F.2d 617, 623-624 (5th Cir. 1963); Waller v. United States, 177 F.2d 171 (9th Cir. 1949).

Given the record herein, the sole purpose to which the evidence of subsequent similar criminal acts could have been put by the Jury on the charges contained in the indictment was to establish that it was more likely than not that the Appellant committed those crimes charged in the indictment, an impermissible use of that evidence of other criminal acts. See Rule 404(b), Federal Rules of Evidence; Roe v. United States, supra at 623.

CONCLUSION

The judgment appealed from should be reversed and the matter remanded to the District Court for a new trial.

Respectfully submitted,

JONATHAN L. ROSNER
Attorney for Appellant

(RELATED CASE)
75CR 298
762258-CIVIL

76C 1610

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA

-against-

LAWRENCE ALFANO,

Defendant.

-----------------------------------X

M.A.F.
Schulman (#55)
9/2/76

ORDER TO SHOW CAUSE

Upon reading the affidavit of MICHAEL G. DOWD sworn to the 31 day of August 1976 in furtherance of an application on behalf of the defendant, pursuant to 28 U.S.C. §2255 and the exhibits attached thereto; and the defendant's application that this Court set aside the judgment of conviction entered in this Court on the 5th day of December 1975 on the grounds that defendant was denied his Constitutional rights to due process of law, equal protection under the laws and effective assistance of Counsel pursuant to the Sixth Amendment:

IT IS HEREBY ORDERED, that the United States Attorney for the Eastern District of New York, David Trager, show cause on the 10th day of September 1976 at 9:00 AM before Judge COSTANTINO in Courtroom #1 at the Courthouse located at 225 Cadman Plaza, Brooklyn, New York, why the judgment of conviction entered in this Court on the 5th day of December 1975 should not be vacated; and;

~~IT IS HEREBY ORDERED, that the defendant LAWRENCE ALFANO, presently incarcerated at the United States Correctional Facility~~

GCP/USDJ

~~at Egland Air Force Base, Egland, Florida be released upon bail of ______________ dollars posted in cash or surety bond pending determination of the issues herein.~~

IT IS HEREBY ORDERED, that service of a copy of this order be made on the United States Attorney for the Eastern District of New York on or before the 2nd day of September 1976 by personal service ~~and that a certified copy of this order be served personally on the warden of the correctional facility where the defendant is incarcerated prior to or contemporaneous with the posting of a surety bond or cash in the amount of dollars as a condition of the defendants release pending a determination of the issues herein.~~

GCP
USDJ

Brooklyn, N.Y.
September 1, 1976

S/ GEORGE C. PRATT
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA

-against-

LAWRENCE ALFANO,

Defendant.

-----------------------------------X

IND. NO. 75CR298

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF QUEENS)ss.:

MICHAEL G. DOWD, being duly sworn deposes and says:

1. I am an attorney admitted to practice before the Court of the State of New York and a member of the firm of Manton, Pennisi, Dowd & Schwartz, attorneys for the defendant herein.

2. Your deponent makes this affidavit in support of the defendants application for relief pursuant to 28 USC §2255 requesting this Court to set aside the sentence and judgment of conviction entered in this Court on the 5th day of December 1975 on the grounds that the conviction was obtained in violation of the laws of the United States; to wit, 18 U.S.C. §2518, and in violation of defendant's constitutional rights to due process of law to be free of unreasonable searches and seizures and to effective counsel under the fourth, fifth and sixth amendments to the Constitution of the United States.

3. Accompanying this affidavit is a Memorandum of Law in support of defendant's application and such matters therein which

are properly the subject of affidavit are hereby incorporated in this affidavit as if fully set forth herein.

4. The defendant herein, LAWRENCE ALFANO, was charged on December 26, 1974, pursuant to indictment #74CR818, with two counts of knowing possession of five airline tickets valued in excess of one hundred ($100.00) dollars which were stolen from a shipment moving in interstate commerce, in violation of title 18, U.S.C. §659. On April 15, 1975, a superseding indictment, Ind. 75CR298, was filed in the United States District Court for the Eastern District of New York, charging the defendant with the same two crimes.

5. On October 15, 1975, the trial on the aforementioned indictment commenced in the United States District Court for the Eastern District of New York before Honorable Orrin G. Judd, United States District Judge, and a jury. On October 22, 1975, the jury returned a verdict of guilty on each of the two counts contained in the indictment. On December 5, 1975, the defendant was sentenced on a verdict of the jury to two years imprisonment and a fine of one thousand ($1,000.00) dollars on count one and two years imprisonment on count two, the terms of imprisonment to run concurrently each with the other.

6. Subsequently the defendant appealed the conviction to the United States Court of Appeals for the Second Circuit which affirmed the judgmental conviction on May 6,1976.

7. Alfano was ordered to surrender to begin execution of the sentence on June 1, 1976. On June 1, the defendant surrendered himself to the United States Marshal at the United States Court House for the Eastern District of New York and is presently incarcerated at the United States Correctional Facility located at Egland Air Force Base, Egland, Florida.

8. The defendant was represented at the trial in this court and in the Court of Appeals by Johnathan Rosner, Esq., 6 East 43rd Street, New York, New York 10017. There were also New York State Court proceedings pending but Mr. Rosner did not represent him in the state court proceedings.

9. Factually, the case concerned a shipment of blank airline tickets from Nashville, Tennessee to two travel agencies in New Jersey in the spring of 1973. During the course of transportation of these tickets from Tennessee to New Jersey a portion of the tickets were reported stolen.

10. Alfano voluntarily appeared before a Grand Jury on February 24, 1974, and stated that he had purchased tickets from a Michael Argondizzo for himself, his family and several friends for a discount, and he did not believe these tickets to be stolen.

11. In view of the defendant's Grand Jury Testimony, admitting use of the tickets but denying knowledge as to their origin, the critical issue in the case was whether or not the defendant knew the tickets were stolen when he purchased them and used them.

12. For proof of Alfano's "knowledge", the government relied on a recorded telephone conversation which was obtained pursuant to a New York state wiretapping order. This was the crucial evidence in the case and the government recognized that it would be such. Indeed, the government even stated it intended to prove possession through these wiretaps (see transcript of hearing before Judd, J., 5/9/75, (Exhibit A) pp. 5-7, 10). It is the failure to suppress these wiretaps which involves the violations of law and constitutional rights which are the subject of this motion.

13. With respect to this most vital issue, namely, knowledge of the fact that tickets which the defendant purchased and used were stolen, the prosecution offered into evidence recorded telephone conversations between the defendant and a female "June", in which she and the defendant discussed the intended purchase of airline tickets at a discount from a man named "Mike" through June's friend "Wally". This conversation was recorded pursuant to a state wiretap order authorizing the interception of communications over telephone #'s 382-9888 and 283-9889. The order was issued by the Appellate Division of the Supreme Court of the State of New York, Second Department and was dated July, 1973. On August 19, 1976 your deponent was given the orders Mr. Rosner states he received from the Assistant U.S. Attorney and your deponent immediately bound, initiated and dated these documents to establish continuity of possession. These documents represent several hundred pages and your deponent will present them to the Court for inspection. The transcript of the recorded

conversation is Exhibit "C". It should be noted that the telephone number on Exhibit "C" is 497-9408, but this clearly is an error. This is a transcript of Plant #2 and the orders with respect to #2 relate to #382-9888 and 283-9889. This is confirmed at page 43 of Exhibit D (a transcript of a related state court proceeding more fully considered later in this affidavit), in which the complicated and numerous orders are systematically set forth and described.

14. Prior to commencement of the trial in this Court, a motion was made on behalf of the defendant, for various forms of relief, including suppression of the tape which was ultimately used at the trial of the defendant. Your deponent was unable to locate a copy of the motion papers in the District Court file nor was he able to obtain a copy from Mr. Rosner.

15. On May 9, 1975, argument was heard by Judge Judd on the motions. A transcript of that argument is attached hereto as Exhibit "A".

16. It is clear that the defendant's attorney received the orders relating to wiretaps which numbered several hundred pages moments before the hearing started. (Ex A., pp. 33-38, 37, 44-45) Included in those papers is the order referred to in paragraph 13 and a sealing order which indicates a delay of 85 days between termination of interceptions and sealing. (Also see Exhibit D).

17. The argument transcript, (Exhibit A) reveals a rambling discourse which appears to terminate without a definite finding by the trial court, although counsel for defendant clearly stated his inability to particularly challenge the wiretap at that time because of the volume of material and the shortness of time permitted to examine it. (Ex A., pp. 44-45, 37). It also seems apparent that Judge Judd had received the orders late the previous date, i.e., at 5:30 P.M. on May 8, 1975.

18. At the conclusion of argument on May 9, 1975, further argument was scheduled for May 15, 1975 at 2:30 P.M. (Exhibit "A", pages 48-48a). Prior to May 15, 1975, defendant's counsel submitted a supplemental affidavit which stated that he would be actually engaged on May 15, 1975 (Exhibit "B" attached hereto) and also indicated that he believed the Court had found the wiretap orders sufficient on their face but complained that the papers appeared incomplete. (Exhibit "B", pages 5,6). However, based on the information and transcripts before your deponent it is unclear whether and when there was a formal ruling by the trial Court covering the legality of the tapes. Indeed, it appears there was no clear ruling.

19. Your deponent submits, upon information and belief, after a conversation with defendant's attorney on August 19, 1976, that Mr. Rosner did not have adequate time to prepare a particularized argument on the wiretap order. This was due to the failure of the government to supply him with the papers a reasonable time

prior to the hearing and the refusal of the Court to provide adequate opportunity for examination thereafter.

20. It is also submitted that if opportunity for examination had been afforded, the papers would have revealed the long delay in sealing (85 days) and that this would have required suppression of the conversation. It is further submitted that the failure to afford counsel this opportunity deprived him of the effective assistance of counsel.

21. Alternatively, it is also submitted that if counsel was aware of the sealing defect then his failure to raise the issue constituted ineffective and incompetent assistance of counsel. Further, if counsel did raise the issue below, his subsequent failure to present the issue on appeal under the facts more fully described herein constituted a deprivation of Alfano's right to competent and effective assistance of counsel.

22. In order not to unduly burden this affidavit with details, the following is a synopsis of the relevant events concerning the state and federal court proceedings as they bear on the issues presented on this application:

(a) No specific challenge to the sealing appears in Exhibit A (the argument before Judge Judd on May 9, 1975) nor in Exhibit B, nor in the trial transcript. As previously noted, the motion to suppress is unavailable to your deponent.

(b) At the time of the argument before Judge Judd, there was a related criminal proceeding in the state court involving the defendant and others.

(c) While Mr. Rosner did not represent Mr. Alfano in the state court, he was not only aware of the state proceedings but more particularly, he was aware that the wiretaps, including Plant #2, were being challenged before Judge Mollen (Ex. A, 29, 35-36)

(d) These wiretaps were challenged by motions to suppress made in the state court before Justice Milton Mollen and a three week hearing was held in December 1975.

(e) Pursuant to that hearing, Justice Mollen issued an opinion from the bench on July 15, 1976 (Ex. D).

(f) Pursuant to that hearing and decision the wiretap conversation used against defendant in his trial in this Court was found to be the product of a tap designated as "Plants 2 and 3" by Justice Mollen. (Exhibit D, page 43).

(g) Those tapes were not sealed until 85 days after the termination of the order. (Exhibit D, page 43).

(h) The District Attorney offered no reason for the delay between the termination of the wiretap order and sealing (Exhibit D, page 52).

23. On July 15, 1976, Justice Mollen suppressed the conversation in the state proceeding. (Exhibit D, page 56). This was used against the defendant in the trial in this Court.

24. On June 22, 1976, the Court of Appeals for the Second Circuit decided United States v. Gigante, relied on by Justice Mollen which held the lack of proper sealing to require suppression.

25. Subsequent to the defendants conviction and more importantly the hearing held by Justice Mollen on the very tape that was used in the defendant's trial in this Court, Mr. Rosner sent defendant a letter dated February 25, 1976. (Exhibit E, attached hereto).

26. In that letter (Exhibit "E") Mr. Rosner complained of fees due and informed the defendant that he would complete the appeal but would "not do so with any great degree of interest", nor would he engage in any post-appeal motions.

27. Mr. Rosner did not contact the defendant in any way after February 25, 1976.

28. Mr. Rosner did not raise the question of the legality of the wiretap in his brief before the United States Court of Appeals for the Second Circuit.

29. After the Court of Appeals affirmed the conviction your deponent was retained and contacted Mr. Rosner, in late May, to ascertain the facts concerning any post appeal motions or relief possible.

30. Mr. Rosner, then and subsequently, refused to discuss the case in any way or turn over any documents until he was paid.

31. On August 19, 1976, Mr. Rosner turned over the file in return for $1100.00 and spent about 2 hours discussing the case with your deponent.

32. In the view of the foregoing, Deponent submits that:

(a) The use of the conversations in Exhibit C violated both the laws of the United States and New York State;

(b) if the issue was raised at the trial, the failure to pursue it on appeal constituted ineffective counsel;

(c) if it was not raised at the trial, this was due either to the court's refusal to afford an adequate opportunity to do so or counsel's failure to do so, which under the circumstances set forth above constituted a deprivation and a denial of Alfano's right to the effective and competent assistance of counsel.

33. Based on the foregoing, the defendant's conviction should be vacated.

34. There has been no prior application for the relief requested herein.

MICHAEL G. DOWD

Sworn to before me this
1 day of September, 1976.

[illegible] G. PENNISI
[illegible] DEEDS
[illegible] NEW YORK 4-1364
CERTIFICATE FILED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 1, 78

5/9/75
12. noon

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MILES CUNNINGHAM, Esq.
Assistant U.S. Attorney

JONATHAN L. ROSNER, Esq.
Attorney for Defendant Alfano

GEORGE MEISSNER, Esq.
Attorney for Defendant Albergo

MICHAEL WASHOR, Esq.
Attorney for Defendant Gallo

RONALD M. KLEINBERG, Esq.
Attorney for Defendant Zenkewrich

Exhibit "A"

THE CLERK: United States of America versus Lawrence Alfano, Philip Albergo, Jack Gallo, Lorraine Zenkewrich and Gus Brown.

MR. ROSNER: For Lawrence Alfano, your Honor.

MR. KLEINBERG: For Lorraine Zenkewrich.

THE COURT: Who else is concerned with this? Jonathan Rosner for Alfano.

MR. ROSNER: Yes, your Honor.

THE COURT: Is the defendant Albergo represented?

MR. MEISSNER: Yes, your Honor, by George Meissner.

THE COURT: Mr. Gallo?

(Defendant Gallo and attorney not present.)

THE COURT: Mrs. Zenkewrich.

MR. KLEINBERG: Ronald M. Kleinberg, your Honor.

THE COURT: Gus Brown.

MR. CUNNINGHAM: As far as Mr. Brown is concerned, I have had conversations with Mr. Blossner, who is Mr. Brown's attorney, and I have made a representation to him that the Government is going to seek a dismissal of the indictment through a 900 form.

A 600

THE COURT: I guess those are the only persons involved, those who are here today?

MR. ROSNER: If I might bring two matters to the Court's attention preliminarily to the hearing on the motions with respect to the eavesdropping.

First of all, I served a notice of motion on the United States Attorney on April 25th, returnable this morning, in respect to the particulars furnished by the Government, which I believe to be wholly inappropriate under the request that I made, and what the Government indicated they would supply me. The language of the particulars that they did give me, insofar as they gave me anything, merely tracks the language of the indictment.

THE COURT: Let's see what Mr. Cunningham can do on these things.

THE COURT: G, H, and I are the ones involved, I think. Also, the time of alleged possession.

MR. ROSNER: That's correct, your Honor.

MR. CUNNINGHAM: Where would you care to start, Mr. Rosner?

THE COURT: Can you give anything closer than the two-month period you have in each one?

MR. CUNNINGHAM: Your Honor, this is a theft of airline tickets that we're dealing with in this indictment. The tickets were stolen on the first date mentioned there and the tickets were flown on the second date mentioned there. The Government was not with the defendant. The Government has no idea when.

MR. ROSNER: If I can respond briefly, the allegation is not the theft; the allegation is the possession and it seems to me under the allgation in the indictment that my client possessed five airline tickets, two under one count, three under another, I'm reasonably entitled to know the approximate date when and the approximate place where he possessed them.

THE COURT: I assume he possessed them at the time of use.

MR. ROSNER: It doesn't allege that in the indictment or the bill of particulars.

MR. CUNNINGHAM: I'm not saying he actually used them.

THE COURT: They were used.

How do you know he possessed them?

MR. CUNNINGHAM: Through recordings in there that are--the Government proof will show he had possession of these tickets.

MR. ROSNER: Mr. Cunningham is approaching this as the Second Circuit, as the Second Circuit said, trial by ambush.

THE COURT: That's a different case. That's when the Government came in with an expert report three weeks before trial.

MR. ROSNER: If I'm to prepare to trial, I'm entitled to know when, the time of alleged theft which my client is not accused of--and alleged use, which Mr. Cunningham says he is not accused of.

THE COURT: The Government has no right to take your client's deposition.

MR. ROSNER: Presumably they had proof of possession to have the indictment filed by the grand jury. Presumably in the grand jury they established approximately when during the period alleged in the indictment and approximately where during the period alleged in the indictment he possessed them.

MR. CUNNINGHAM: That is not the case. I'm sure Mr. Rosner is well aware of that. One of the tape recordings which has been turned over to counsel states, is a recording of Mr. Alfano talking to another person, where he states in his own voice on the records, "Of course these tickets are good. My family flew on them last week."

MR. ROSNER: My response is there is no simple link between that alleged tape recording and the ticket involved in this indictment.

MR. CUNNINGHAM: There certainly is. They are enumerated there, have the names of Mr. Alfano's family members on it.

MR. ROSNER: That in and of itself does not establish possession.

In addition, as I indicated in a letter to Mr. Cunningham May 1st, 1975, I'm entitled to Request No. 2 for discovery, that is any other tickets the Government has that they intend to introduce into evidence which Mr. Cunningham denied me in my informal request for discovery.

THE COURT: I think he should get that.

MR. CUNNINGHAM: I contacted Mr. Rosner, told him I would be willing to accede, and I will so advise the Government is not aware at this time of any other tickets that will be introduced during the trial of this action. In the event other tickets materialize between now and the trial of this action, they will be immediately turned over to the defense counsel as soon as the Government becomes aware of it.

MR. ROSNER: As I understand, only the five tickets, copies of which you're giving me, are going to be introduced.

MR. CUNNINGHAM: Yes.

THE COURT: I don't think the Government has any information to be much more precise on the dates of possession.

With respect to Item F, the value appeared on its face at the time of theft or the time of possession, do you know that?

MR. CUNNINGHAM: I'm sorry, your Honor? Referring to Question F?

THE COURT: Yes.

MR. CUNNINGHAM: At the time of the theft of the tickets, the tickets were blank. The defendant possed the tickets we are assuming-- I don't know when he possessed them, if the tickets were blank. I do know he possessed them when the tickets were filled in.

THE COURT: They were filled in at the time of his possession.

MR. CUNNINGHAM: Yes, some portion of the time.

THE COURT: G is whether he is alleged to have sold the tickets.

MR. CUNNINGHAM: I don't see how that's relevant, your Honor. We're not saying, we're not saying he's dealing in stolen goods. We're saying he possessed stolen merchandise.

THE COURT: You're not alleging he sold them?

MR. CUNNINGHAM: No, your Honor.

THE COURT: You don't expect to put in any such proof, now.

MR. CUNNINGHAM: Your Honor, at this time I don't think I should be restricted as to what the proof of the trial will be, but I don't think there's any reason to particularize the indictment. We're saying he possessed tickets stolen from interstate shipment. What he did with those goods thereafter I don't think is pertinent here.

THE COURT: If he sold them, it helps to put some greater precision if you allege he sold them on some particular date or particular person, it puts greater precision on the time of possession.

MR. CUNNINGHAM: The Government's evidence is going to show that the names on two of the tickets or three of the tickets, rather, is the name Alfano. Whether or not he sold it or gave it to members of his family is irrelevant here.

THE COURT: Were they alleged to be used by members of the family?

MR. CUNNINGHAM: The name says Alfano right on the ticket.

THE COURT: That doesn't prove who used them. You can hand up any ticket.

MR. CUNNINGHAM: Also testimony in the wire tap where he states his family did fly down to Florida, did use tickets. Whether or not the same ones, of course, will be proved at the trial.

THE COURT: I see. That probably covers it; it also states whether the defendant participated in the alleged theft.

MR. CUNNINGHAM: I don't think it's relevant.

THE COURT: Other than the evidence of participation from recent possession. Do you expect to put in anything else?

MR. CUNNINGHAM: No, your Honor.

THE COURT: Item I, the identity of the issuing agency for each ticket. Something about Wings on Wheels.

MR. CUNNINGHAM: The issuing agency will probably be Mr. Alfano.

MR. ROSNER: The Government can't have it both ways. First they say he didn't make the make the entries, and now they're saying he probably put the entries on them.

THE COURT: I presume they will show, as they did in one other trial, there were some tickets that were sent to Wings and Wheels that disappeared and the numbers of those tickets correspond or include the numbers of the tickets that were used by Mr. Alfano.

MR. ROSNER: Obviously--

THE COURT: When you come to the issuing agencies-- Isn't this the outfit described in the last trial, the one that issues these things?

MR. CUNNINGHAM: I don't know what he means by issuing. I always assume issuing a ticket means the act of an airline writing out a ticket and issuing a ticket.

MR. ROSNER: Airline or travel agency.

THE COURT: I presume what Mr. Rosner wants to know is who prepared and forwarded the tickets.

MR. CUNNINGHAM: I don't think that's applicable, your Honor.

THE COURT: Well, you know who is it. I've forgotten the name.

MR. CUNNINGHAM: Your Honor, I'm of the opinion right now that the Government is not aware

— who wrote, actually wrote, the tickets.

THE COURT: I don't care who wrote the tickets. The tickets were presented. They were presented for some cooperative airline agency, were they not?

MR. ROSNER: I'll take that representation as satisfying my inquiry under I.

THE COURT: Very well.

MR. ROSNER: I still have a problem, quite candidly, your Honor, with my request for the approximate time, the approximate place within the periods covered by the two counts of possession.

As I understand it, Mr. Cunningham--

THE COURT: I suppose the Government may be able to say if the tickets were stolen on a particular date, presented by a later date by members of Mr. Alfano's family--

MR. ROSNER: They are not accused. Only Mr. Alfano is. If I understand Mr. Cunningham's position, the proof of possession will come from the alleged eavesdrop conversation. From that conversation alone, and if that's the representation, I'll accept that. If the Government has more precise information as to where and when, I think I'm entitled to it.

MR. CUNNINGHAM: I don't think the defense is entitled--

MR. ROSNER: How can I defend over a two-month period if they are not more precise? My client may be elsewhere if the Government contends. I can't obtain witnesses who would establish that unless I know the approximate time.

THE COURT: I don't think this is an alibi case where it is alleged a gun was shot on a particular date. I think the Government has provided all the information it needs on that point. I deny the rest.

MR. ROSNER: I'm sure the Government provides me with all the information the Government needs. They haven't provided me with all the information I need to prepare.

THE COURT: All the information it needs to provide.

MR. ROSNER: I'll place on the record, your Honor, if the Government establishes with more particularity at the time of trial the alleged time and place of possession, I may be put in the position of asking the Court for a continuance.

THE COURT: I have that.

You asked also to dismiss for duplicity

and various other things.

MR. ROSNER: Yes.

THE COURT: Failure to state whether it was taken from a platform or depot.

MR. ROSNER: Yes, your Honor.

THE COURT: You cite the Third Circuit on your side and the Fourth Circuit on the Government's side. If the Government has any other cases on that--

Mr. Washor, I see you're here. Are you here for Mr. Gallo?

MR. WASHOR: I received notice of this hearing and I was under the impression from the representations made by the Government to me, that in no manner and no ways were there any eavesdropping connected to or to be utilized by the Government during the course of the Gallo trial. Further, I have been advised that no leads were taken from the tapes other than amicus curiae. We're relying on that representation, and I am present. I presume I have no legal standing.

THE COURT: It's a public courtroom. You're entitled to be here.

MR. WASHOR: It's a pleasure to see you, Judge.

THE COURT: I don't know if it matters, the other ways in which the various airline ticket cases are related. You're currently down for trial--

MR. WASHOR: The 27th.

THE COURT: On the 27th, yes. I don't know what the outcome today is going to be with respect to other trial dates set. We'll consider that. We're going to get down presently, I think, to the matter of wire taps.

Anything else?

MR. CUNNINGHAM: The Government is not aware of any other cases that would be applicable.

THE COURT: This is the same indictment on which the conviction was had in the last case, is that correct?

MR. CUNNINGHAM: Yes, your Honor.

THE COURT: I'm going to deny the motion. I don't think I need follow the Third Circuit, that an indictment has to be as precise as was the requirement in the 19th Century.

Anything else before we go to the wire tap matter?

MR. ROSNER: Your Honor has denied the other aspects of my motion to dismiss, including the argument we put forward, the indictment and the superseding indictment drafted contains within each count the allegations of multiple crimes. The cases seem clearly to indicate receipt is one crime and possession is another. They are both charged in this indictment.

THE COURT: That's all right. I have tried lots of cases that involved alleged receipt and possession of 500 cartons of stolen goods, and I would think it is quite unreasonable to require the Government to have 500 counts or 500 separate indictments or here to have different, separate counts instead of two separate counts.

I presume everyone has received these inch and a half of wiretap documents.

MR. KLEINBERG: Yes, your Honor.

MR. MEISSNER: May it please your Honor, before we get into that, can I just raise a few minor points which I think we might be able to dispose of.

THE COURT: Go ahead.

MR. MEISSNER: In my particular case, and it may be so in regard to one or more of the other defendants, there was a grand jury appearance by my client, and there was a question of the immunity and the question of what if any evidence was obtained by the Federal Government as a result of that. I have contacted the District Attorney of Kings County in order to get a copy of the grand jury minutes, and they, of course, refused to turn that over to me without a court order.

THE COURT: I always grant those. Has there been a request?

MR. KLEINBERG: Yes. In fact, I made a formal request before your Honor with respect to that and I believe that your Honor's ruling in this particular matter was that I was to attempt to secure those minutes on my own, and I in fact, probably the same thing Mr. Meissner, by speaking to the chief of the Rackets Bureau, Kings County, he indicated to me that an application was made by Ms. Zenkowrich's counsel in the State Court for such minutes.

THE COURT: I think it's extraordinary a grand jury witness can't get his own minutes.

MR. KLEINBERG: Right. We're seeking to obtain that, your Honor.

THE COURT: Give me an order.

MR. KLEINBERG: It may be expedited is that an application has been made in the State Court by the attorney who happens to be here now representing Mrs. Zenkewrich. As soon as he gets those minutes, he will provide them for me, so I could dispense with Mr. Cunningham trying to obtain them. I'll be able to utilize them for the purpose of the motion.

THE COURT: Let's get these minutes. You say, Mr. Kleinberg, somebody else is getting them.

MR. KLEINBERG: Yes, counsel in the State Court had made an application, your Honor. I thought it would expedite.

THE COURT: Is that the gentleman who is with Mr. Rosner?

MR. ROSNER: Yes, Mr. Kaplain.

THE COURT: Mr. Kaplain, do you think you'll be able to get those minutes?

MR. KAPLAIN: I have made my motions in the State Court in February. They have not yet been heard or argued. We're now on for May 14th, but how they will be disposed of or what length of time they take I can't begin to estimate.

MR. CUNNINGHAM: Might I make a suggestion.

THE COURT: Yes.

MR. CUNNINGHAM: To have defense counsel follow your Honor's original suggestion, have them prepare an order, submit it to you, and sign it, and we can get the minutes probably within twenty-four hours.

MR. MEISSNER: I have no objection. Mr. Cunningham might have the minutes, so it would be expedited.

MR. KLEINBERG: With respect to that, I think as a matter of right in the Federal Court as well as in the State Court, a witness is entitled to her statements before a grand jury and I don't think this will be a contested question in the State Court. It's just a question of getting the minutes together and giving it to counsel and as far as I'm concerned it's just a question of getting in touch with the stenographer in the State grand jury to have her type up the minutes. They should be ready as quickly as possible.

THE COURT: Mr. Kaplain apparently says it takes three months even to get a hearing on it.

MR. KAPLAIN: Each time I have appeared I have been advised by the assistant handling it that particular morning the grand jury minutes have not yet been typed. They have 150 arrests. I don't know in what order they have been preparing the minutes.

MR. CUNNINGHAM: I might say the grand jury minutes in this case, while defense counsel might like to have them for numerous reasons, has really no application to the trial of the case at bar. Mr. Albergo and Zenkewrich were accused of perjury. They said they knew nothing about airline tickets. Regardless of what transpired in the first grand jury, it's not relevant to a perjury indictment in the Federal Court, how it will assist them in any way.

MR. KLEINBERG: In response to that problem, I outlined in my moving papers, which is before his Honor on the 19th, also in my original moving papers for discovery, the fact that in U.S. v. McDaniels and before that, U.S. Supreme Court in Kastigar indicated that if any evidence is derived or any testimony derived after the party obtains immunity and is compelled to testify before a grand jury and that information is then secured by another agency, another law enforcement agency, they may be deprived of using that evidence, the testimony against the witness in another court proceeding, and I'm seeking to determine also, the Kastigar opinion and the McDaniels opinion affirmatively puts the obligation upon the U.S. Attorney to indicate they in no way utilize any information from the state agencies, and I'm saying, your Honor, we at least should have the opportunity to contest that by looking at the State grand jury testimony.

THE COURT: Do you mean a man may lie before the grand jury because he shouldn't have been asked the question?

MR. KLEINBERG: If the predicate for the questions that were asked to the witness in the grand jury, your Honor, stems--

THE COURT: Those cases don't say that.

MR. KLEINBERG: I think it does, your Honor.

THE COURT: He perhaps might have reviewed the right to be asked the questions, but I don't think he has any right to lie.

MR. KLEINBERG: No witness has a right to lie before a grand jury, your Honor. I'm saying that, also, no U.S. Attorney has the right to go contrary to law with respect to the dictates and mandates of the United States Supreme Court with respect to Kastigar. I'm indicating all I would like to do and I'm sure Mr. Meissner is on the same footing I am to seek that initial information to see if we have ground to contest that.

MR. CUNNINGHAM: I think we're fishing in the dark here again. The reason that Ms. Zenkewrich was before the grand jury, a wire tap on the Crossroads Bar. Her telephone number is Memorial Hospital. It's a certain extension in the hospital where she is a secretary. The man would make the telephone call and the operator would say, "Memorial Hospital."

"I would like to have 3976."

There were conversations in 1973 involving airline tickets. She was called before the grand jury and asked if she know and she said no, and she was indicted.

MR. KLEINBERG: With respect to that, two-fold, indicating as apparent by the wiretap information which was just received a few moments ago from Mr. Cunningham, it appears that the information which they received was from a state agency. I believe, looking at the taps, the orders and the affidavits with respect to the wiretap orders indicate it was both from a Kings County District Attorney's office and the Suffolk County District Attorney's office. It's apparent then the federal agency was in direct contact with state agencies. It is also apparent the witness testified in a state agency before she appeared in the federal grand jury. If there was contact in that respect, I think I should be entitled, your Honor, under the mandate of the Kastigar decision, under the decision of McDaniels to see her grand jury testimony in the State Court.

THE COURT: Not on a perjury case.

MR. KLEINBERG: Your Honor, the question is the predicate-- If the questions that were asked in the grand jury were obtained after a witness received immunity, after she was compelled to testify in the state grand jury, then those questions and answers and that information was then taken and turned over to a federal authority, your Honor, the strictures of Kastigar, the strictures of McDaniels, should come into play.

THE COURT: Not as to her right to give false answers.

MR. KLEINBERG: If they did not have the questions to ask, your Honor, she would not give false answers.

THE COURT: She was asked the questions and she is charged with answering them falsely.

MR. KLEINBERG: Allegedly.

THE COURT: Yes. No, she's charged with answering falsely.

MR. KLEINBERG: That's right.

THE COURT: I don't think I should adjourn the trial on the 19th on account of the slowness of the Kings County Grand Jury in providing the stenographer, in providing minutes on an irrelevant matter.

MR. KLEINBERG: Your Honor, I indeed think this is not an irrelevant matter. If the predicate, the basis for questions which were asked in the grand jury are illegally obtained, and I say that under the language of Kastigar and the language--

THE COURT: I went all through this in Persico. I put a man in jail for sixty days and I was affirmed by the Court of Appeals. Brooklyn Law Review doesn't like it, but that's my ruling.

MR. CUNNINGHAM: If I might say for the record, as far as I am conconcerned from my knowledge of this case, the grand jury minutes have never been turned over to the Federal Government. The Government hasn't seen them.

THE COURT: They haven't been transcribed.

MR. CUNNINGHAM: I have no knowledge. Assuming the defendant was granted immunity in the state grand jury and she was asked the question, "Do you know anything about airline tickets?" if she said "Yes, I do," fine. We then ask her the same question in the grand jury and she lies to us, she's going to be prosecuted on the previous immunity.

THE COURT: They can't grant immunity against a federal crime.

MR. KLEINBERG: She received in the grand jury, state, transactional immunity.

THE COURT: Against federal prosecution? That's impossible.

MR. KLEINBERG: No--

THE COURT: How can the Federal Government be at the mercy of a local district attorney to grant transactional immunity?

MR.KLEINBERG: With respect to that, your Honor, they very well may be, if one reads the case of Picarello, and the concurring--dissenting opinion by Judge Brennan, he indicates, of course, there is a very strong obligation upon any assistant district attorney to know exactly what he's going to be doing before he takes a witness to the grand jury and subjects the witness to possible transactional immunity. I think that there is, your Honor, a possible--

THE COURT: We had Picarello before. It has no relation.

MR. CUNNINGHAM: Nothing he has cited has anything to do with perjury, the cases Mr. Kleinberg has cited.

MR. KLEINBERG: All these cases deal-- these cases do not deal with substantive crimes; they deal with procedure, your Honor. What they do is they make manifest upon the district attorney's office or U.S. assistant attorney's office, certain things under the strictures of law. That's the remedy which they placed upon these that occurred. All we are asking is to be able to be provided with an opportunity-- In fact, there may not be anything with respect to the grand jury testimony. All I would like to have is the right to look at that grand jury testimony.

THE COURT: You have the right, and I will sign an order for you, but I won't delay the trial on that account.

MR. CUNNINGHAM: Your Honor, I just thought of this now. I had a conversation with Mr. Michael Hammerman, who is in the Queens District Attorney's office--

MR. KLEINBERG: Kings.

MR. CUNNINGHAM: Kings County. I asked them very specifically yesterday whether or not he asked anything about airlines or airline tickets of people appearing before the grand jury. He replied in the negative. That should satisfy him. They were interested in gambling.

THE COURT: It may well be the defendants have told Mr. Kleinberg that they were in fact asked about it. He's been rather secretive on that subject.

MR. CUNNINGHAM: Is there a representation--

MR. KLEINBERG: I think this could be answered better than asking Mr. Hammerman. I think perhaps as Mr. Cunningham would ask the Assistant U.S. Attorney who handled the case in the grand jury whether he obtained any information from the state grand jury. I think an affirmative answer to that may well put us in the seat, and I won't get up and talk any more.

MR. CUNNINGHAM: Could Mr. Kleinberg ask his clients whether or not she was asked any questions about airline tickets. It would solve the thing, or was there any basis for pursuing this idle conversation. Do you wish to ask your client?

MR. KLEINBERG: My client has a very bad memory.

THE COURT: I suppose while I have said I will not postpone the trial on this account, I should entertain a motion supported by an affidavit by the client saying why she is prejudiced by not having grand jury minutes of another proceeding where she is not charged with having lied. I'll receive these also for the 19th.

Anything else before we get to the wiretaps?

MR. KLEINBERG: Also with respect to the wiretap application, I also spoke to Mr. Hammerman yesterday, Assistant District Attorney in Kings County with respect to this. The last time I made my motion for discovery, your Honor, I indicated that we were not supplied with Judge Barshay's--

THE COURT: I thought I had the order.

MR. KLEINBERG: To date we received all-- Well, I don't know if we received all of it, but we received applications and eavesdropping warrants and a number of other applications which I have not had time to peruse, look over, but with respect to the phone conversation which I had yesterday with Mr. Hammerman, who I believe was the assistant district attorney in Kings County that was handling this matter and another matter dealing with a related matter, dealing with these wiretaps, he indicated to me the basis for the original wiretap information which was utilized to secure the conversations which gave probable cause for the actual warrant which is before the Court, goes all the way back for about a year and a half to two years, and that a hearing, a full and complete hearing was just conducted in the state court before Justice Milton Mollin, determining the validity of these wiretaps, and I believe, your Honor, the hearing had terminated a few days ago, and the judge at this point is reserving decision on the permissibility and the legality of those taps.

THE COURT: Don't you have Judge Weinstein's memorandum? He's signed them after an evidentiary hearing.

MR. KLEINBERG: I haven't seen that from Mr. Cunningham with respect to that. I would like to know how that order or decision is different from what we have today. It very well may be on all fours, your Honor, and no reason to contest this, but I at least would like to be guided in a proper adversary proceeding with that information.

THE COURT: Mr. LaRossa's office--isn't it in here? He was in that proceeding before Judge Weinstein. Have you extra sets of those minutes?

MR. WASHOR: Might I aid the Court?

THE COURT: Yes.

MR. WASHOR: I'm familiar with Judge

Weinstein's hearing. I'm familiar with the hearing in Kings County, and may I just state to inform the Court the hearing before his Honor Judge Weinstein did not encompass the issues that were raised relative to the validity of the order in question that had been a protracted hearing of approximately three and a half to four weeks before Judge Mollin, so that the decision of Judge Weinstein in staying the order I suggest does not encompass all the issues that might well be raised at an evidentiary hearing at this juncture.

THE COURT: What other issues?

He went into minimization, background.

MR. WASHOR: The question of probable cause, reliability of the informant, the question of the minimization.

THE COURT: Minimization he went into, the reliability--

MR. WASHOR: I'm suggesting Judge Weinstein decided the question of minimization, but not the question of probable cause, existence of an informer, the reliability of an informer. I would concede that Judge Weinstein's order declaring that there has not been abuse vis-a-vis the minimization aspect or requirement does not preclude raising of the issues of the nonexistence or probable cause.

MR. CUNNINGHAM: Your Honor, I might ask the capacity in which Mr. Washor is speaking.

MR. WASHOR: If you so desire, I will be more than happy to leave. I just want to get my licks in now; that's all.

Your Honor, might I aid again the Court?

THE COURT: Yes.

MR. WASHOR: Having been totally familiar with what went on in the state court, there are three orders amongst others that were subject to inquiry, in spite of my adversary's desire, maybe, to have me leave, I may be able to aid the Court. Three of the orders, all emanating from Suffolk County, the first order--

THE COURT: I think I have the first Suffolk County order here.

MR. WASHOR: Telephone LT9-1547, affidavit of September 1972.

THE COURT: October 26, '72.

MR. WASHOR: I believe there's one before that.

MR. CUNNINGHAM: The first order is of September 22, '72.

MR. WASHOR: That's correct.

MR. CUNNINGHAM: By Judge Cohalin.

MR. WASHOR: Telephone LT9-1547, if that would aid the Court in finding which order I am referring to. With respect to that particular order the following issues have been raised before State Supreme Court Justice Milton Mollin, including the minimization aspect. The question of the existence of an informant, questions if there is one such informant, the reliability of such informant.

THE COURT: I'm not going back into the existence of an informant. I have an affidavit of a policeman here, a confidential and reliable informant told them there are many other players who telephoned their bets to LT9-1547.

MR. WASHOR: Might I pose rhetorical questions? When did he get the information, rhetorically two years prior to the application? I'm not being facetious when I suggest--

THE COURT: He also says he called the number, used the informant's code name.

MR. WASHOR: That's correct.

THE COURT: He was able to put bets.

MR. WASHOR: That is correct. He makes that statement. We also determined there was an alleged tape made at the time, so that there would be a recordation of this, be better than any affidavit the existence of a recording and, suspiciously I suggest, it has disappeared. No one seems to know where it is.

THE COURT: It's six years ago, wasn't it?

MR. WASHOR: It seems to me recordings were saved long enough ago to be the basis of a prosecution now that the most important recording of them all seems to be the one that's missing.

THE COURT: Three years ago.

MR. CUNNINGHAM: I'm going to specifically request that Mr. Washor be seated in this matter.

MR. WASHOR: I will.

THE COURT: It will help me. Apparently the other parties don't know the problems here.

MR. ROSNER: You only got the papers the first time this morning. I got a half inch of papers, and I haven't had a chance to look at it.

MR. MEISSNER: That applies to all of us, your Honor.

MR. ROSNER: I might specifically suggest in addition, your Honor, with all due respect to the Court, Mr. Washor and Mr. Cunningham, that as far as my client is concerned, and I don't know whether I speak on behalf of our counsel, I don't think we're bound by the cross-examination of the police officers or the assistant district attorneys that were conducted before Judge Weinstein or Mr. Justice Mollin.

THE COURT: I don't see any necessity to call the police officers. We have affidavits that were presented to a neutral magistrate, and that he found sufficient and you have to show me some reason to disbelieve them before you can have an evidentiary hearing. This is only a perjury indictment-- The question is whether she lied before a grand jury.

MR. ROSNER: My client is not indicted for perjury, your Honor.

MR. KLEINBERG: With respect to that, I would like to quickly answer again that if the evidence which is obtained before the grand jury was illegally secured, then of course my client would have the right to contest that.

THE COURT: Yes, you have the papers on which the wire taps were based.

MR. KLEINBERG: As Mr. Rosner indicated, I received the papers about ten minutes before the court--

THE COURT: I gather you're satisfied that the papers prior to those you got this morning are all right. You want no hearing with respect to those; is that right?

MR. KLEINBERG: I don't understand the question.

THE COURT: Well, you had all the Kings County papers before this morning. You just got the Suffolk County papers. Is there any dispute?

MR. ROSNER: That is not true. I did not get all the Kings County papers before this morning.

THE COURT: I have no suppression motion before me. What does anybody want to suppress?

MR. KLEINBERG: What I asked for, your Honor, before my discovery papers were all these applications and after I received two applications, your Honor, from Mr. Cunningham and the first application made mention of a prior application by Judge Barshay, I asked the court in my moving papers and through Mr. Cunningham to furnish me with that prior order and affidavit underlying that order. Today is the first date which I received that with a mass of other papers. I also indicate to the Court upon a conversation which I had yesterday with the Assistant D.A. in the State--

Brooklyn Kings County District Attorney's office indicated to me that these wiretap orders go back for a good length, period of time and they just had a hearing before Judge Mollin to contest the illegality of those orders. I'm bringing that to the Court's attention for its own benefit.

THE COURT: He's a good judge.

MR. KLEINBERG: He's an excellent judge.

MR. CUNNINGHAM: I would like to state for the record the Government turned over to defense counsel in utmost good faith all of the orders that it knew about involved on the Crossroads Bar. At that time I was advised in open court by Mr. Kleinberg that there was an order that was missing. I said, "Fine. You tell me what the order is and I will proceed to get it for you."

I spoke to Mr. Kleinberg. He said, "Where is the order?"

I said, "Please send me a letter." I have a letter dated May 1, '75, received May 5th, 1975, requesting the affidavit of Hyman Barshay dated May 22, 1973." I immediately proceeded to get Justice Barshay's order. In the process I notice his order referred to previous orders which referred to previous orders. Since May 5th until this morning I have been tracking down orders, trying to get them all here. This morning is the first time I have been able to see counsel, give all the orders in the Government's possession to the Court last night at about 5:30, and the morning is the first time I have given it to counsel:

THE COURT: Mr. Alfano, the first one on the motion list, is charged with possession of airline tickets of April of 1973. When is the first time when any conversation that Mr. Alfano was overheard?

MR. CUNNINGHAM: I believe Mr. Alfano's conversations came in on the first time, the first tap--

MR. ROSNER: Perhaps I can assist the Court.

THE COURT: Yes?

MR. ROSNER: Based only upon the papers that I got from the Government on April 20th and not on the papers I received today because I have not read them, in the affidavit, affidavit of William F. Carney, sworn to on June 13th, 1973, at page 30 appears the first reference in any of the papers that I have to a "Larry" at the number, purportedly the number of the Crossroads Bar. That reference is May 30th, 1973.

Now, I only come to that by implication, if you will, that that was the first date, because I haven't reviewed all the rest of the papers.

THE COURT: He has no standing to challenge any orders before the ones in effect then, does he?

MR.ROSNER: If we assume for the sale of argument that the order of Mr. Justice Martisello(ph) on June '73--the one I have is undated, I assume it's about June 14th of '73--if that is the first, for the sake of argument the first order that makes reference to the Crossroads Bar, nonetheless, if the chain culminating in that order is defective in any way, I would specifically submit that it affects all the subsequent applications and orders.

THE COURT: You may submit it, but is that a sound argument?

MR. ROSNER: I believe under case law it is.

THE COURT: Give me some case law.

MR. ROSNER: I'll be happy to.

THE COURT: You'll have to have standing to challenge a wiretap order.

MR. ROSNER: As I understand it, what the Court is saying is if in 1972 there was a defective eavesdropping--

THE COURT: Against Joe Blow--

MR. ROSNER: --eavesdropping against Joe Blow, that led subsequently to an order against Mr. Alfano, Mr. Alfano has no right to trace back to the origin of the order that now is being used against him.

THE COURT: Isn't that sound?

MR. ROSNER: I don't believe so, your Honor, because it means quite simply the Government can tap illegally and indiscriminately until they come upon something that they like and then present a proper application and a proper order and put in a proper tap.

THE COURT: You don't have to carry things to extremes like that.

MR. ROSNER: That's the burden, your Honor, of what I think the Court is intending.

MR. CUNNINGHAM: Your Honor, there has been no--

THE COURT: Is there any challenge to any order that was received before today? By anyone?

MR. KLEINBERG: Your Honor, I indicated there has been a full blown adversary hearing with respect to those orders before Justice Mollen.

THE COURT: We're in Federal Court today on a particular case. Is there any challenge made by anyone here to any order that was received before today, and if so, what is the challenge?

MR. MEISSNER: Your Honor, these challenges are based on the prior orders, based on information--

THE COURT: In other words, the challenge-- All right, there are no challenges except with respect to the prior orders?

MR. MEISSNER: As they derive from prior orders,your Honor, we have received today both State-- Kings County orders, your Honor. It's not that we had all the Kings County orders previously. I received certain documents today. I don't know what's in them. I haven't had a chance to read them. I think, your Honor, that first of all it would be important if we would designate these documents and make sure that we all have the same documents and I would like to have them marked so that each of us really has the same documents.

THE COURT: Go ahead. That's a good idea.

MR. MEISSNER: I would appreciate that very much.

Then, of course, we get into the question, the entire question of minimization of audibility.

THE COURT: There's no audibility of telephone wiretaps. They're always audible. I'll hear those at the time of the trial.

with them.

MR. MEISSNER: I want a copy.

MR. CUNNINGHAM: They're not good photocopy. The photocopy will not improve the quality.

MR. KLEINBERG: Your Honor, if I may, I spoke to Mr. Cunningham yesterday. I asked if it's possible since Mr. Meissner would be here today, if I could possibly listen to those, save the Court time and Mr. Cunningham's office, to find out if they're audible.

MR. CUNNINGHAM: 5:15 I received a telephone call from Mr. Kleinberg, "By the way, about the taps, how about listening tomorrow morning?"

I said, "Thank you very much."

THE COURT: We're now practically at one o'clock and I have a couple of arraignments and a sentence at two. I hadn't anticipated-- Well, I had been ready because I thought we might have some kind of hearing.

MR. ROSNER: For the record, if I can get back to the taps, your Honor, I did receive from Mr. Cunningham eight sheets labeled "Plant No. 2 BNPMD, Reel 528, 7/7/73, 8/7/73. That's legible and I assume that's the only tap or recording Mr. Cunningham intends to introduce.

MR. CUNNINGHAM: That's right.

THE COURT: Why don't you try during the lunch hour to coordinate, compare, and work out a numbering system for all the wiretap applications and orders that have been supplied.

MR. CUNNINGHAM: The Government has a copy of that here which I have gone ahead, done that. I have designated each one of the taps and--

THE COURT: Can you make copies?

MR. CUNNINGHAM: Yes.

THE COURT: Please do that. I don't know if they want to go down to your office while you prepare them or wait until after lunch.

MR. ROSNER: Might I make a suggestion to the Court? In light of the fact that today we received such a voluminous amount of wiretap orders and applications which we hadn't seen heretofore, might I specifically suggest to the Court that this hearing be adjourned until counsel has had an opportunity to review it and perhaps then particularize--

THE COURT: How about Monday afternoon?

MR. ROSNER: I'm not sure I'll have the time to review it between now and Monday.

THE COURT: You probably read it more closely than I would feel bound, unless my attention is directed to some spots.

MR. ROSNER: Could we recess until your Honor picks a time when counsel would particularize to Mr. Cunningham and the Court the basis for objections, at least based on the materials we have gotten so far? The Court can then determine whether we're entitled to an evidentiary hearing.

THE COURT: If I hold it on Wednesday, it wouldn't interfere with the Zenkewrich trial on Monday. 2:30 Wednesday the 14th.

MR. KLEINBERG: Can it be possibly Thursday? I happen to be engaged on Wednesday.

MR. ROSNER: I must state to the Court I'm presently scheduled to start a trial in Supreme Court, New York County, in front of Mr. Justice Rosenberg on the 13th, which I think is Tuesday, a matter he's been holding since March 13th.

THE COURT: Who represents Mrs. Zenkewrich?

MR. KLEINBERG: I do.

THE COURT: When are you available?

MR. KLEINBERG: With respect to the hearing, your Honor?

THE COURT: Yes.

MR. KLEINBERG: If it's possible, I would like to have--

THE COURT: You want it Thursday? I'll hold the hearing 2:15 Thursday on Zenkewrich.

Anyone else who wants to be heard may attend.

MR. ROSNER: As I say, I may be on trial.

MR. MEISSNER: May 15th?

THE COURT: Yes.

MR. CUNNINGHAM: Perhaps I suggest Albergo's counsel be there, it will immediately follow the Zenkewrich trial.

MR. MEISSNER: I'll be here.

MR. KLEINBERG: Your Honor--

THE COURT: That's Mr. Meissner.

MR. MEISSNER: Yes, I accept your Honor's attention without Mr. Cunningham's.

MR. KLEINBERG: I also have, I believe, a motion pending before this court with respect to an application to dismiss the indictment on a number of points.

THE COURT: Didn't I cover that before?

MR. KLEINBERG: No, your Honor. I submitted, your Honor, both affirmation and I believe a lengthy memorandum with respect to support of my point.

Your Honor, there are a number of points which I raise in the memorandum.

THE COURT: I'll study it.

MR. KLEINBERG: I wish you would give consideration to it. Might I just be permitted--

THE COURT: You can argue that on Thursday. I'll study it by then.

MR. KLEINBERG: What I was going to ask, might I be able to receive the prosecutor's memorandum in opposition so I'll be able to reply to that in time, your Honor?

THE COURT: Can you get in any answering papers on Wednesday?

MR. CUNNINGHAM: I'm looking this over. I'm wondering whether or not the Court wants answering papers. The point he's bringing up on appeal--

THE COURT: You don't have to make it forty pages long, but you could cite twenty-six pages long, a half dozen cases you think bear on it.

I once had a Chicago lawyer who briefed a brief was a brief, and he cited cases and left his oral argument instead of putting it on paper. He didn't win, but it's a good idea, British idea.

MR. KLEINBERG: I would like to do a little bit of that now, one point which I neglected to raise in my motion to dismiss dealt with the aspect of the U.S.A. v. Mandjuanno, but in any event, your Honor, that dealt with the obligations of a prosecutor to give full warnings to a witness before a grand jury on certain set circumstances.

THE COURT: You mean the oath means she has to tell the truth.

MR. KLEINBERG: He has to go further than that. He has to give full Miranda warnings.

THE COURT: There is no such case.

MR. KLEINBERG: There is a case.

THE COURT: It's wrong.

MR. CUNNINGHAM: Thank you.

MR. KLEINBERG: You may be right. It's tried before the United States Supreme Court right now. A number of other cases to follow that case. I think it's not wrong. When you have a situation where you have a possible target, and a defendant before the grand jury and who is unprotected without counsel, I think a prosecutor has an obligation to warn that witness of certain rights which he has. I think fundamental fairness dictates that. The cases--

THE COURT: I will read it.

MR. CUNNINGHAM: I'm hearing an awful lot of law except every subject relevant.

THE COURT: I don't know whether we're learning or not.

MR. CUNNINGHAM: As a matter of fact, I would like to quote from the beginning of the testimony of Mrs. Zenkewrich when she testified before the grand jury, which apparently counsel has not chosen to read.

"Because you're a witness before this grand jury, I wish to advise you of certain of your rights and privileges. Among them are the following:" and it goes through one and a half pages. One is specifically about perjury. It couldn't have been warned any further.

MR. KLEINBERG: Interpretation by learned counsel and also an interpretation by witness who is unsophisticated before a grand jury.

THE COURT: I would suppose when you take an oath to tell the truth it's a pretty simple obligation that you're undertaking.

MR. KLEINBERG: We're of course indicating everything that she answered in the grand jury was truthful. That's not the issue which I'm raising before the Court, your Honor, specifically so.

THE COURT: I'll be a little after two before I get back for the arraignments. I'll see some of you or all of you on Thursday at 2:15.

Mr. Cunningham, cases to me and Mr. Kleinberg by Wednesday morning.

MR. WASHOR: I do not have to appear, I presume?

THE COURT: No.

4.

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U.S. DISTRICT COURT E.D. N.Y.
★ JUL 21 1975 ★
TIME A.M. ....
P.M. ....

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------X

UNITED STATES OF AMERICA :

-against- : Docket No. 75 CR. 298
(O.G.J.)

LAWRENCE ALFANO, : SUPPLEMENTAL AFFIDAVIT:
SUPPRESSION OF EVIDENCE

Defendant. :

-----------------------------------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JONATHAN L. ROSNER, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this Court and am the attorney of record for the Defendant Lawrence Alfano. I respectfully submit this affidavit in further support of a motion, pursuant to Rule 41, F.R.Crim. P., to suppress for use as evidence, materials and evidence obtained by the Government as a consequence of illegal and surreptitious searches and seizures.

2. Indictment. The original indictment herein, 74 Cr. 818, was filed on or about December 26, 1974, and charged the Defendant Alfano in two (2) counts with the illegal receipt and possession of five (5) airline tickets which were stolen from a shipment moving in interstate commerce. 18 U.S.C. §659.

While there was pending before the Court an omnibus motion brought on behalf of the Defendant seeking dismissal of the indictment, further particulars, discovery, suppression of evidence and exculpatory materials, a superceding indictment was returned. That indictment, 75 Cr.

Ex "B"

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298, filed on or about April 15, 1975, similarly contains two (2) counts, each alleging a violation of 18 U.S.C. §659, involving the receipt and possession of five (5) airline tickets allegedly stolen from a shipment moving in interstate commerce.

3. Disposition of Motions, etc. The Government filed no responsive papers to the Notice of Motion returnable February 21, 1975, seeking dismissal of the Indictment, further particulars, discovery and inspection, and exculpatory materials, nor did the Government submit any papers in response to the Notice of Motion returnable May 9, 1975, seeking further particulars and discovery and inspection.

In the interim, the Government did furnish what purports to be a Bill of Particulars under letter dated April 22, 1975, and as well furnished copies of the five (5) airline tickets which are the subject of the two (2) counts of the Indictment, as well as copies of the documentation allegedly establishing the interstate character of the shipments from which the tickets were allegedly stolen. In addition, the Government furnished to the Defendant a copy of his testimony before the Grand Jury that returned the indictment and a copy of an eight (8) page transcript of an eavesdropped conversation overheard and apparently recorded on August 7, 1973, at Telephone No. 497-9408 where the participants to the conversation were "Larry", "June" and "Vinnie".

Additionally, the Government furnished what purports to be copies of all relevant Eavesdrop Orders or Warrants and applications in connection therewith, which indicate the existence of twelve (12) such Warrants or Orders, including three (3) in Suffolk County and nine

(9) in Kings County, as follows:

1. Order of Supreme Court, Suffolk County dated 9/22/72 for LT 9-1547

   Affidavit of George Aspland, Esq., sworn to 9/21/72
   Affidavit of Peter Loughlin, sworn to 9/21/72

2. Order of Supreme Court, Suffolk County dated 11/4/72 for 421-3422

   Affidavit of George Aspland, Esq., sworn to 10/3/72

   Affidavit of Peter Loughlin, sworn to 10/2/72

3. Order of Supreme Court, Suffolk County dated 10/20/72 for 261-0988

   Affidavit of George Aspland, Esq., sworn to 10/ /72

   Affidavit of Peter Loughlin, sworn to 10/19/72

4. Order of Supreme Court, Kings County dated 1/26/73 for 638-9048

   Affidavit of Eugene Gold, Esq., sworn to 1/25/73

   Affidavit of Thomas Fitzgerald, sworn to 1/25/73

5. Order of Supreme Court, Kings County dated 2/23/73 for 638-9048

   Affidavit of Eugene Gold, Esq., sworn to 2/23/73

   Affidavit of Thomas Fitzgerald, sworn to 2/23/73

6. Order of Supreme Court, Kings County dated 2/ /73 (Unsigned) for 779-1580

   Affidavit of Eugene Gold, Esq., sworn to 3/13/73

   Affidavit of Thomas Fitzgerald, sworn to 3/13/73

7. Order of Appellate Division, Second Department, Supreme Court, dated 4/11/73 for 779-1850

8. Order of the Appellate Division, Second Department, Supreme Court, dated 5/ /73 (Unsigned) for 779-1580

   Affidavit of Eugene Gold, Esq., sworn to 5/10/73

   Affidavit of Thomas Fitzgerald, sworn to 5/10/73

9. Order of Supreme Court, Kings County dated 5/22/73 for 497-9617

   Affidavit of Eugene Gold, Esq., sworn to 5/22/73

   Affidavit of William F. Carney sworn to 5/22/73

10. Order of Appellate Division, Second Department, Supreme Court, dated 6/14/73 for 382-9888 and 382/9889

    Affidavit of Eugene Gold, Esq., sworn to 6/14/73

    Affidavit of William F. Carney, sworn to 6/13/73

11. Order of Appellate Division, Second Department, Supreme Court, dated 7/ /73 (Unsigned) for 382-9888 and 283-9889

    Affidavit of Eugene Gold, Esq., sworn to 7/ /73 (Unsigned)

    Affidavit of William F. Carney, sworn to 7/6/73

12. Order of Appellate Division, Second Department, Supreme Court, dated 9/13/73

4. Motion to Suppress, etc. On May 9, 1975, together with counsel for the Government and counsel for other defendants whose indictments arose out of the chain of eavesdropping warrants and orders outlined above, I appeared before the Court for a "hearing" on the several motions to suppress. Much of the material affording counsel the information with respect to the eavesdropped conversations was not furnished by the Government until the commencement of the "hearing". During the colloquy in

respect of the motions to suppress,* the Court indicated that the Defendant Alfano lacked the requisite standing in respect of any and all conversations, warrants, orders, and applications prior to those numbered "10.", "11." and "12." above, since only those warrants, orders and the applications incidental to them revealed conversations to which the Defendant Alfano was a participant, and only the one numbered "11." had to do with the single conversation of the Defendant Alfano that the Government intended to offer into evidence. Moreover, the Court further indicated that as the orders, warrants and applications appeared sufficient on their face, and since another member of this Court had presumably found the eavesdropping lawful in related matters, absent a demonstration on the part of the Defendant Alfano and other defendants similarly situated, the Court would not conduct an evidentiary hearing.

It is, of course, too late in the day to conclude, as the Court did, that the Defendant Alfano has no standing to challenge the earlier eavesdrop procedures which were the derivation for the procedures bottoming the challenged conversations offered against him. See, e.g., Nardone v. United States, 308 U.S. 338; Silverman v. United States, 365 U.S. 505. See also, American Bar Association Standards Relating to Electronic Surveillance §2.3 at page 115; United States v. Giordano, 94 S.Ct. 1820. ('74)

Moreover, the materials furnished by the Government fairly indicate extended gaps in the surviellance and as well indicate applications and order which do not on their face appear to have been signed. In addition, it is respectfully submitted that certain of the applications afford a neutral and detached magistrate no basis on which to issue the orders or warrant requested since the predicate for reliability of the information on which the application is based is set forth in only the most conclusory fashion. In addition, certain of the orders in the chain, viz., numbere "3.", fairly indicate an indiscriminate eavesdropping without the sufficient foundation required constitutionally. Even beyond that, many of the applications appear facially to be mere repetitions of prior applications, and neither the applications nor the orders give any indication that appropriate protective procedures, such as minimization, were adopted. Finally, the extensive nature of the continuing search and seizure, conducted over a period of in excess of One (1) year raise serious questions as to the constitutionality of the conduct.

---

* The Court denied Defendant's motion to dismiss and also denied Defendant's motion for further particulars, although the particulars furnished merely parrot the allegations of the indictment. As noted at the time, such rejection of a good-faith request for further particulars may well cause an interruption in the middle of trial due to surprise and prejudice.

At the conclusion of the "hearing" on May 9, 1975, the Court indicated it would hear counsel further in respect of particularization of claims arising out of the warrants, orders and applications, on May 15, 1975, at 2:30 P.M. As I indicated at that time, I am scheduled to commence a trial in Supreme Court of the State of New York, County of New York, before Honorable Samuel R. Rosenberg, Justice, in Individual Calendar Part VI on Tuesday, May 13, 1975. I have just communicated with Mr. Justice Rosenberg's Chambers and was advised that the trial is in fact to commence on Tuesday, May

13, 1975, and will thus be unable to attend the Court on May 15, 1975 at 2:30 P.M.

In light of the foregoing, and the rulings of the Court in respect of the motion to suppress on behalf of the Defendant Alfano, I will respect the rulings of the Court both as to suppression, particulars and discovery, letting the record stand as it presently does, and indicate to the Court that I am not in a position to prepare further for trial. Thus, the Court may indicate as it desires a date for trial consistent with my other trial commitments.

JONATHAN L. ROSNER

Sworn to before me this
12th day of May, 1975.

Ann E. Ferrer

ANN E. FERRER
Notary Public, State of New York
No. 31-6278190
Qualified in New York County
Commission Expires March 30, 1976

Sheet # 1

[illegible] TIMES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
2	497-9408	Larry = L. June = J. Vinnie = V L owner of Mr. Luckies a Bar in Queens	

J. Mister Luckys
L. Yeah babe
J. Hi
L. Is Vinnie there
J. Yeah baby
L. Put him on, hello
J. Yeah
L. What about you, did you make up your mind
J. Listen I want to ask you a question
L. What
J. Do you know a guy Mike that comes down your place.?
L. Yeah
J. You is that who you deal with
L. Yeah
J. The same guy
L. yeah
J. Thats the same guy I'm getting
L. Oh yeah, how do you manage that?
J. By, through this other guy I know, Wally, a friend of mine
L. Wally?
J. He deals with this guy
L. Ah huh
J. He gave me a price 660
L. Yeah, well that's ok, you know, Im doing it because of you. I make a little less but thats the right price
J. Ah Yeah
L. I told you about 75 or 80 dollars off
J. Yeah, ah, so ah, he's giving me a price of 660, but the guy is fucking me around
L. Why, what do you mean fucking you around? I got him here right now.
J. Yeah
L. Yeah
J. Ask him what is he doing there he is supposed to be at Wallys with my tickets.
L. Hello hold on

GOVERNMENT EXHIBIT
19
75CR298

Ex "C"

A-652

Sheet # 2

T # 2 ENTD AND DATE	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
# 52 73	497-9408	Larry = L. June = J. Vinnie = V.	J. Yeah L. Ah (Larry speaking to som-one else) J. ~~[illegible]~~. (Speaking to someone else) Wait, Wally , Larry on the phone (Inaudible) L. (To someone else) do you have some tickets to Colorado, Inaudible, whats this all about, Inaudible. L. Hello J. Yeah L. Alright, you work through me, ok. Let this Wally alone because we got a problem with him. J. With him? L. Yeah, just as well, through indirect things, that this happen to come out the way it is now, but I got a problem that owes me money, you know what I mean, so the reason that this guy : Mike is holding back because this guy owes us money J. And meanwhile he's fucking me up planty L. You aint getting fucked up, You're in, dont worry about it J. Wait a minute talk to Vinnie because he's got to leave , then talk to me L. Ok, Hello Vinnie V. Yeah L. I got this guy up here now, he got something in the mail today that said that check cleared tell Patty. V. Cleared L. Yeah, we're gonna hope that's his check we're talking about, cause, cause we dont know, ask Patty if his bank, if he had it in Manufacturers ~~[illegible]~~ Hanover V. Thats where he had it L. That's where he put that check in then that check cleared, it was paid. V. Ok L. Ok V. Alright

A-653

# 2 AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
8/7/73	497-9408	L.= Larry J.= June V.= Vinnie	L. Then give me a call tommarow and I'll come down and ah pay him. V. Alright L. Alrighty V. Yeah L. Put skinny on J. Yeah baby L. Yeah J. Now because he called me last night and tells me, give me 400. L. Ah huh. J. You were here when I told you, right. L. Right J. I says I'm not giving you 400, I don't know those people you're dealing with. L. Right J. You know, so then he says to me, ah, alright look. He says this guy Mike now says he'd lay out the money for me, pick up my tickets and he would bring them to me. L. Right J. I said alright. L. I was gonna lay it out. J. Oh, you were gonna lay it out. L. Sure, who knew it was you, though. J. Yeah L. Laughing J. So now, the story was, that I'm waiting for this guy, so now today he call's(inaudible) this morning at 8 o' clock he supposed (inaudible) he can't find this guy. L. Um, huh. J. So now he says to me, As soon as he come's with the tickets, I'll call you, and I'll bring em right to you.(inaudible) the fucking money I'm got("Adjida"-italian for heartburn), I'm getting sick(inaudible) L. Alright, hold on a second now. (Larry talking to someone in the background-inaudible)-then continues taking to June- Alright June, you work through me, I'll get, you'll have

Continue on page 4.

Sheet#4

LANT # REEL AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
52 3/7/73	497-9408	L.= Larry J.= June	

you're tickets by tomarrow.----Ok?
J. By tomarrow, definite?
L. Yeah, of course well they're, they're all s
all the guy, now this guy ain't coming up
with no money, understand?
J. I have all the money for my tickets.
L. ~~I have all the money~~)
L. I know but he ain't coming up with it, we
don't have to worry about you, he's got to
come up with the money, understand, like hi
~~Him~~- now I'm gonna come up with the money.
J. In other words he wants the money laid out
before he brings the tickets.
L, No, only from this guy, because this guy is
jerk around, he owe's us money so we got to
collect cash from him, understand?. Anybody
else, we would say heres the tickets give us
the money, you know, but he's a jerk around
,he owes us, like today he just gave me
$350.00, he's supposed to give me $750.00
you know, so thats $400.00 shott, he is
already, but what.
J. So now I know it was you because I just call
ed him, I said, what the fuck you doing so
you got me here that Im sick as a dog, worr-
ied about those fucking tickets, I said
where are you with them, you know. He says
ah this guy Mike, he says you know maybe he'
at the Crossroads, I said, the Crossroads?
I said where the Crossroads, He said on Metr
opolitan Ave. I said, oh yeah, I says I kno
the owner very good. He says, yeah, whos the
I says his name's Larry, he says Yeah I dont
know the guy, he says like that
L. He dont know me!
J. So I says oh, you know, so he says maybe Mike
is up there you know
L. Um-huh
J. he says let me give him a call and find out

Continued on page # 5

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A-655

NT # 2 BRFTD L AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
1 # 52 773	497-9408	Larry = L. June = J.	June continued J. He's supposed to call me back and let me know if he got in touch with Mike, and what the st was, and Im sitting here like a fucking schmuck, eating my heart out. L. Right, alright, tomorrow night you'll have your tickets, have your money ready, and they'll be in your hands. J. alright L. Ok? J. Now where am I going to get them L. Well youre getting them through Mikey, you're getting them through Mikey, so leave, the price gotta stay the same. J. Alright I L. I cant cut his price you know what I mean? J. Yeah L. That I cant do J. Now he's going to issue them, and what, when is, where are you goin get them, L. When, you'll have them tomorrow night, you need them for Friday ~~might~~ night. J. Yeah Friday night. L. Ok tomorrow night........... Hello hang on a second J. Yeah L. (Speaks to someone in the background) then returns... Hello J. Yeah L. Tommorrow afternoon, you got em. J. Alright dynamite. L. Ok dont bother with this guy, if he calls you or what ever it is. Tell him forget about the whole deal, you're not interested in it. J. Yeah .... Inaudible. what the fucks goin L. Yeah well it does get a little leery, but it really doesnt matter. We usually do ~~it~~ like about the day before you know we, we make sur we give em to you J. Yeah.

continued on page 6

NT #2 BNFMD L AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
eel # 52 /7/75	497-9403	Larry = L. Juno = J.	

L. Theres a reason for it.
J. Now let me ask you something though.
L. What?
J. If I get nailed with them, right
L. Yeah
J. What am I out the bread?
L. Ah well it's all according how it happens, you know what I mean. There should be no reason you should get nailed, there's only one way you could possibly get nailed with them, babe; thats if you try for a refund
J. Nah, I aint going to do that, Im gonna use the
L. Well lets say for arguements sake one of the per, people on the trip dont want to go.
J. Yeah
L. You lose the ticket, if you try for a refund then you gotta get nailed.
J. Yeah right
L. Understand, thats about the only way I heard of anybody ever having a problem with those things.
J. But just flying with them, you got nothing to sweat
L. No problem, I just came back myself, I took my whole family, and I wouldnx never do that if I did'nt think it was sure, Right?
J. Right
L. So you take it from there, you know what I mea
J. Yeah, well I'll take your word for it
L. Right I sent Stevie, his family, everybody, an nobody had any problemx.
J. Right
L. But the problem would be if you tried to refund them, try to get your money back.
J. Right
L. Then you're gonna wind up with a problem
J. I mean the airlines is gonna accept them (inau
L. No problem
J. They told me, I told you, they told me, go to any travel agent.

continued on page 7

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AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
# 52 '73	497-9408	Larry = L. June = J.	L. You could do, those tickets, you could do what ever you want with them, you could change it to different airlines, do whatever you want with them. J. Yeah L. Know what I mean, don't worry about them. J. Ask him if he has all the information for (inaudible) L. He has, he's got everything in his pocket. He's waiting, he was just waiting for the cash J. Oh he don't have the tickets with him though L. no, no J. (inaudible) L. He cant, he cant get the tickets without cash How8s he gonn get, ticket, get en without, the people he gets it from want to get paid. J. Yeah right L. Now I collect it from the people, that I, I give em to, then it's my problem you know. J. Yeah L. But in the meantime, he's got to have his money. J. Right. L. Alright so tommorrow afternoon, you'll have them. J. Alright you gonna bring them to me in the after noon tommorrow? L. Yeah J. Ah listen now, I dont want my boyfriend to know Im getting them through you now L. Ok J. You know what I mean? L. Right H. So if he's here give em to Vinny and I'll give J. Vinny the cash when I see you walk in, I'll hand Vinny the cash and you give me the tickets L. Ok

continued on page # 8

A-658

Sheet # 8

# 32 [illegible] AND DATES	PHONE# - LISTING	PERSONS SPEAKING	PERSONS, PLACES MENTIONED, CUE WORDS.
L # 52 /73	497-9408	Larry = L. June = J.	J. Now I'll just tell my boyfriend that the guy called me up L. Right J. And talked to me and explained to me why I'm having a run around, is causs Wally owes em money, you know I'll explain to him. L. Right J. But I dont want you connected in any way L. Ok J. Alright hon L. Inaudible J: Alright so I'll see you tommorrow afternoon L Ok J: Oh babe, thanks a lot Larry L. So long J. Bye, bye

A-659

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM, PART 21

- -X

PEOPLE OF THE STATE OF NEW YORK :

-against- :

ANTHONY MANGIARACINA, STEVEN MALTESE, :
GIORLANDO CATALANO, ET AL.
:
Defendants.
:
- -X

Indictment No. 5161/73, et al. July 15, 1976
Brooklyn, New York

BEFORE:

HONORABLE MILTON MOLLEN, Justice.

APPEARANCES:

MESSRS. LaROSSA, SHARGEL AND FISCHETTI
BY: RONALD P. FISCHETTI, ESQ., of Counsel

STEPHEN LAIFER, ESQ.
BY: DAVID JACOBS, ESQ., of Counsel

JAY ZERIN, ESQ.
WILLIAM SIMON, ESQ.

MARTIN G. KAROPKIN, ESQ.,
Assistant District Attorney
Appearing for the People

ROSALIND N. RUSSO, CSR
OFFICIAL COURT REPORTER

THE COURT: Now, gentlemen, I am prepared to render my decision on the motion to suppress.

Before I do, is there any desire on the part of anyone to make any oral statement based solely on the last explanation of memorandum from the People and letter from Mr. Fischetti? I don't want to repeat all the arguments that I have heard over a long period of time. But, if there is any desire to say any last word based on where it's just recently submitted, I would have no objection to hearing from you.

However, I might add that, parenthetically, I don't feel it's necessary. But if you have that desire I will hear you.

(A short pause.)

THE COURT: No one indicating any desire to be heard, the Court is prepared to proceed in this matter.

This is a motion by sixty eight defendants to controvert certain eavesdropping warrants which are the basis of the sixty eight indictments as against those defendants and to suppress all evidence and the fruits obtained thereof as a result of the conversations electronically intercepted pursuant to any of those wiretap orders.

As a result of electronic surveillance approximately 500 individuals were subpoenaed to appear before a Grand Jury in Kings County. Approximately 150 men and women who did appear before that Grand Jury were indicted for the crimes of perjury in the f[illegible]gree, promoting gambling in the first degree and conspiracy to commit the crime of gambling in the first degree.

While most of the defendants were indicted separately, both they and their counsel consented to this Court conducting a joint evidentiary hearing to determine the legality of these eavesdropping orders and the legality of the manner of exclusion of these orders.

During the course of this suppression hearing, which lasted more than three weeks, the defendants challenged the validity of 31 wiretap orders on various legal grounds.

Based upon the testimony adduced during the course of the hearing, the Court makes the following preliminary findings.

An investigation into illegal gambling activity was commenced in September of 1972 in Suffolk County where the first eavesdropping order, pertinent to this hearing and motion, was issued on September 22, 1972. As a result of that first order, two additional orders were issued in Suffolk County on October 4, 1972 and October 20, 1972. Information obtained from these wiretaps was given to Detective Fitzgerald, who was assigned at that time to the Detective Squad of the District Attorney's office in Kings County, he was advised that illegal gambling activity was being conducted in Kings County.

As a result of the information which Detective Fitzgerald obtained, a series of wiretap orders were obtained on the 'phone located at the Nester Social Club located at 237 5th Avenue, Brooklyn, New York, and also on the 'phone located at Sonny's Car Service at 7021 45th Avenue, Queens.

Information which was obtained as a result of the wiretap at Sonny's Car Service was used as well as information supplied by an informer to obtain an eavesdropping warrant on telephone number 497-9617 assigned to the Bushwick Democratic Club located at 131 Wyckoff Avenue, Brooklyn, New York.

This warrant was dated May 22, 1973 and was to be effective from that date until June 20, 1973 and permitted the interception of communications over telephone number 497-9617. Information obtained as a result of the so-called Bushwick tap led to the issuance and execution of the other wiretap warrants which are the subject of this motion along with subsequent extensions and renewal. The information obtained from the intercepted communications of these wiretap orders provide the basis for the indictments in this proceeding.

Now, at this time I have not prepared a formal opinion with regard to the issues which have been presented. Instead I treat with the various issues individually. And I may subsequently prepare an opinion which will be published. But at this time I will treat the various issues and contentions which have been raised by various counsel in this case.

First I would treat with the argument raised by defendants that all of the evidence obtained through the use of the eavesdropping order dated September 11, 1973 relating to the Crossroads Lounge, People's Exhibits 7A through 7R, must be suppressed since the above order was issued in violation of Section 700.05, 700.10 and 700.15 of the Criminal Procedure Law.

Section 700.05, Subdivision 8, sets forth a list of designated crimes for which an eavesdropping order may be issued. And Section 700.10, Subdivision 1, provides that a warrant may issue to a prosecuting official for investigation or prosecution of a designated offense which must be the subject matter of the application for the warrant. Section 700.15, Subdivision 2, states that a warrant may issue only when there is probable cause to believe that a designated offense has been or is about to be committed.

Defendants argue that the order of September 11, 1973 was issued for the crime of obstructing governmental administration and that this crime is not one of the designated offenses set forth in Section 700.05, Subdivision 8. Defendant's argument may be summarily dismissed as being devoid of merit for the order set forth eight other designated offenses which are clearly enunciated in and set forth in Section 700.05, Subdivision 8. Under the circumstances, the fact that included therein is a non-designated offense, does not, in this Court's judgment, warrant the suppression of the evidence obtained from the wiretap order pertaining to that particular order.

Now, defendants next argue that the warrants issued herein are void because they fail to comply with the requirement of Section 700.15, Subdivision 4, of the Criminal Procedure Law which reads as follows: It is entitled "Eavesdropping Warrants; When Issuable," and provides as follows: "An eavesdropping warrant may issue only: *** " And then Subdivision 4, "Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ," end of quotation.

Section 700.20 entitled "Eavesdropping Warrants; Application," provides in part as follows: Under Subdivision D, and I quote, "A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appeared to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought," end of quotation.

Captain William F. Carney, in his affidavit which was submitted in support of the first warrant issued on May 22, 1973, stated that he had been engaged in an investigation of crimes in violation of gambling laws of this State; that he had taken part in numerous investigations involving the violation of the gambling laws of the State of New York, and during the course of said investigation he had become fully familiar with the functioning of illegal bookmaking combines as to both their structure and as to the terminology used in that particular endeavor.

Captain Carney further stated, and I quote, "The deponent states that this investigation is now concerned with identifying other unknown perpetrators and the locations of the other telephones being utilized by this combine.

"Deponent further states that surveillance of the area surrounding 137 Wyckoff Avenue, Brooklyn, New York, has not met with any success. And it is deponent's opinion that continued surveillance will not meet with any substantial results but will greatly endanger the secrecy of the crimes under investigation.

"Deponent states that in the commission of the crimes under investigation it is not necessary for the participants to meet with any frequency and almost all illegal communications between the parties involved ocurred telephonically between closed doors.

"It is clear that no other means of investigation could accomplish that which is being sought in this eavesdropping warrant and further probing by surveillance may result in the premature disclosure of the needs of this investigation and otherwise prevent the attainment of the objective sought," end of quotation.

The purpose of Section 700.15, Subdivision 2D, is not to foreclose electronic surveillance until every other imaginable method of investigation has been successfully attempted but simply to inform the issuing Judge of the difficulties involved in the use of conventional techniques. And I cite for that, United States v. Pacheco, 489 Fed 2d 544 at Page 565.

After studying the application of District Attorney Gold and the affidavit of Captain Carney, both of which were submitted in support of the warrant issued May 22, 1973, this Court holds that there was full compliance with Section 700.20, Subdivision 2D, and Section 700.15, Subdivision 4.

Defendants further contend that the warrant dated May 22, 1973 permitting the interception of telephonic communications over telephone number 497-9617 at the Bushwick Democratic Club was invalidly issued since the crime set forth in the order refers to, and I quote, "A violation of Article 225 of the Penal Law," end quote, without any specific reference to a particular section of the statute.

Defendants therefore argue that pursuant to the United States Code Section 2516(2), an eavesdropping order may only issue where the punishment to be imposed will exceed one year.

Defendants next state that Article 225 of the Penal Law contains several sections which are misdemeanors and, therefore, that the punishment may not exceed one year and, thus, claim that the order was invalidly issued. An examination of the order discloses that the Court determined there was probable cause to believe that, "that evidence of the commission of crimes in violation of Article 225 of the Penal Law of the State of New York, more specifically, crimes of promoting gambling, possession of gambling records and a conspiracy to commit said crimes ***," would be obtained if the warrant was issued, end of quotation.

In People v. DiFiglia, 50 Appellate Division 2d 709 at Page 7, the Court in a unanimous per curiam opinion stated as follows: "Appelant's main contention is that the order suppressing the evidence was improvidently issued because neither the New York State statute nor the Federal eavesdropping statute prohibits electronic surveillance to provide evidence of the designated offense of gambling, punishable as a misdemeanor. CPL 700.05 (subd. 8, par. (c)) specifically designated the crime of promoting gambling in the second degree (Penal Law, Section 225,05), a misdemeanor offense, as a crime for which an eavesdropping warrant may issue. 'Section 2516(2) provides that the principal prosecuting attorney of the state or any political subdivision thereof, if authorized by State statute, may apply for an order permitting the interception of communications' when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses,' end of quotation.

"Defendants contend that the clause 'and punishable by imprisonment for more than one year' limits all the listed offenses, and that the statute authorizes interceptions only in respect of felonious conduct." (United States v. Carubia, 377 Fed. Supp. 1099 at Page 1104). The phrase "punishable by imprisonment for more than one year" as used in a statute permitting interception of communications when

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such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb or property, and punishable by imprisonment for more than one year. (U.S. Code, tit 18, Section 2516, subd. 2) modifies only the catch-all category of all other crimes; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized.

This statute was not simply aimed at major crimes (United States v. Carubia, 377 Fed. Supp. 1099, supra). People v. Fusco (75 Misc. 2d 981) held that our State courts may authorize wiretapping to investigate violations of our laws against illegal gambling.

"Furthermore, Congress expressed an explicit intent not to preempt gambling enforcement from the states ***. Congress has, therefore, made available to State enforcement officers the tool necessary to fight gambling by interception of wire communications," end of quotation. This Court further notes that Article 225 pertains to both felonies and misdemeanors in terms of gambling offenses.

This Court, therefore, finds that the defendant's argument as to the setting forth of the crime as a violation of Article 225 of the Penal Law is totally devoid of any merit.

Defendants further contend that the evidence obtained pursuant to these eavesdropping warrants must be suppressed since the evidence was obtained in violation of the Criminal Procedure Law Section 700.30, Subdivision 2, in that the District Attorney failed to name known individuals whose telephone conversations were to be intercepted over a specific telephone.

Section 700.30 entitled "Eavesdropping Warrants; Form and Content" provides in part as follows: "An eavesdropping warrant must contain," under Subdivision 2, the identity of the person, if known, whose communications are to be intercepted," end of quotation.

Thus, the defendants argue that the District Attorney, where he has knowledge, before obtaining the warrant, of the identity and involvement of the individual engaged in illegal activity which activity is to be the subject of the eavesdropping order, then in such event, the District Attorney must name that person in the application for the eavesdropping warrant.

The leading case on the subject is United States v. Kahn, 415,(U.S. 143) which was decided during the year 1974. Justice Stewart, at Page 151, stated as follows: "To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime. There is, of course, some tension between these two states Congressional objectives and the question of how Congress struck the balance in any particular instance cannot be resolved simply through general reference to the statute's express concern for the protection of individual privacy. Rather, the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting title 3."

Now, after some other language, this Court believes, and not necessarily appropriate or relevant to its ruling in this matter, Justice Stewart stated the following: "We conclude, therefore, that title 3 requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought. Since it is undisputed that the government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons 'as yet unknown' covered by Judge Campbell's order," end of quotation.

In the instant case it is not sufficient for defendant to argue that he should have been named in the eavesdropping warrant solely because he was known to the Police Department as a "known gambler" or that he was suspected of being a gambler. Rather, the defendant must establish that the police, in fact, had probable cause to believe his conversations about these illegal activities would be intercepted over the telephone lines being tapped. While many of the defendants in the instant case were known to the Police Department as "known gamblers" there was no demonstration that the Police Department had probable cause to believe that the defendants' conversations concerning their illegal activities would be intercepted over the particular monitored telephone.

Even were this Court to assume that probable cause was established and that certain defendants should have been named in some of the warrants which are the subject of the within suppression hearing, that would not mandate this Court to grant the relief requested by defendants and suppress the conversations that were intercepted on the mentioned telephones.

In United States v. Kilgore, 518 Fed. 2d 496, 5th Circuit, the appellants contended that the government intercepted communications from the defendant Kilgore but only mentioned Green and "others yet unknown" in the application for the wiretap order.

Judge Goldberg, writing for a unanimous court stated as follows: "The question of whether suspected parties aside from those whose communications are sure to be intercepted must be identified as being considered by this Court sitting en banc. We have decided that the failure to name such an intercepted party would not invalidate the wiretap where the intercepted party was not prejudiced by the failure to be so named."

Judge Goldberg went on as follows in United States v. Doolittle, 5th Circuit 1975, 507 Fed. 2d, 1368, affirmed en banc, we said: "The wiretap authorization referred to 'Billy Cecil Doolittle and others as yet unknown.' Anderson and Baxter contend that the government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in United States v. Kahn, 1974, 415 U. S. 143, 94 Supreme Court 977, 39 law edition, 2d, 225, they argue that, not being unknown, they should have been named in the authorization.

"They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization.

"The government contends that its agents had personal knowledge as opposed to information to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent.

"All defendants received an inventory of the intercepted conversations, were allowed to listen to tapes and received transcripts of the conversations prior to use against them at trial as if they had been named in the order.

"Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap.

"We hold there was substantial compliance with the requirements of the act and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. Section 2518(10) (a)."

In the instant case before this Court the omission of any defendant's name in an eavesdropping order must be held to be inadvertent. And this Court holds that there has been no indication of that faith or subterfuge by the District Attorney in his wiretap applications.

Furthermore, the defendants whose names were omitted have not demonstrated to this Court's satisfaction that they sustained any prejudice as a result thereof. All defendants, whether named or unnamed, have been given an opportunity to listen to the tapes, to read the transcript and participate in the within suppression hearing. This Court, therefore, holds that even where there was a failure, under the circumstances indicated herein, to name a known party in an eavesdropping order, such error does not render the intercepted conversations suppressible where the defendant has failed to demonstrate to the Court that he has sustained any prejudice as a result thereof and where the District Attorney appears to have acted in good faith.

Now, the Court further finds as a result of the testimony which was adduced throughout the course of the lengthy hearing and on the basis of the affidavits and applications which were submitted and formed the basis for the issuance of the wiretap orders that, in each instance, sufficient facts were brought to the Court's attention so as to establish probable cause for the issuance of the wiretap orders.

Now, the defendants contend that the refusal to disclose the identity of the informant referred to in the warrant issued on May 22, 1973 resulted in a denial of their right to confrontation under the Sixth Amendment. Defendants further argue that the primary basis for determining probable cause in that warrant was the information supplied by the undisclosed informant.

An examination of the affidavit submitted in support of the order dated May 22, 1973 discloses that it was executed by the earlier mentioned Captain William S. Camey on May 22, 1973. Captain Camey stated that he had been engaged in an investigation of crimes in violation of Article 225 of the Penal Law; that while a member of the Police Department he had taken part in numerous investigations involving violations of the gambling laws. And in the course of said investigations he had become fully familiar with the manner in which a bookmaking operation functions both as to its structure and as to the terminology employed by those engaged in that type of activity.

Captain Camey then detailed the facts of a telephone conversation which was intercepted over telephone number 779-1580 pursuant to a valid Court order to telephone number 497-9617.

Captain Camey stated that on March 21, 1973 a call was placed from a telephone number 779-1580 by Harry Finkel to telephone number 497-9617 to a male identified as Jerry. During the course of that conversation Mr. [illegible] placed three separate twenty dollar bets on three horses.

This Court holds that without considering any of the informant's information contained in the affidavit of Captain [illegible] dated May 22, 1973 there was sufficient probable cause for the Justice to issue the eavesdropping warrant. Even if this Court was to hold that the above conversation did not establish probable cause, it would nevertheless hold that the warrant was validly issued.

Captain [illegible] further stated in his affidavit that he had obtained information from an informant that he, the informant, had been present inside the [illegible] Democratic Club on numerous occasions for several years and had taken horse bets and policy numbers over telephone number 497-9617 both during the day and at night; that he had taken bets over that phone as late as May 4, 1973; that on May 4, 1973 and May 7, 1973 telephone calls which were consensually recorded by the informant or placed by the informant to telephone number 497-9617; and that during the course of these two conversations, the informant placed several policy bets with Jerry.

This Court conducted an in-camera hearing at which time tape recordings of those two conversations were placed wherein the informant, in the presence of Lieutenant Kennedy, dialed telephone number 497-9617 and placed the aforementioned policy bets with an individual who identified himself as Jerry.

Furthermore, this Court conducted a second in-camera proceeding at which time the informant was produced. After questioning the informant at length, the Court concluded that he did exist and that he did furnish the police with the information set forth in the affidavit of Captain Carney.

The informant also specifically verified that he did make the two telephone calls wherein policy bets were made with Jerry over telephone number 497-9617.

The informant further advised the Court of the facts and circumstances which were set forth in the affidavit of Captain Carney and that such were relied upon by the informant in reaching the conclusion that illegal gambling operations were being conducted at the Bushwick Democratic Club over telephone number 497-9617.

At the termination of those in-camera hearings, this Court concluded that the information supplied by the informant and set forth in Captain Carney's affidavit constituted sufficient probable cause for the issuance of the warrant.

In People v. Pena, 37, N. Y. 2d, 642, Judge Fuchsberg, writing for a unanimous Court and unanimous catastrophe, stated at Page 644 as follows: "Recently, in People v. Goggins (34 N.Y. 2d, 163, cert, denied 419,U.S.1012) and People v. Brown (34 N.Y. 2d, 163, cert, denied 419 U. S. 1012), where we laid down guidelines which we reiterate with undiminished force today, we made it clear that the initial burden to compel disclosure is on the defendant.

"As Judge Wachtler then put it (Page 169), 'bare assertions or conclusory allegations by a defendant that a witness is needed to establish his innocence will not suffice. Instead he must show a basis in fact to establish that his demand does not have an improper motive and is merely an angling in desperation for possible weakness in the prosecution's investigation' (citation omitted.)

"On that basis we concluded that an applicant's burden may be met when weakness is found in the case against him whether manifested during the People's or the defendant's case or when the issue of identification appears to be a close one."

And then Judge Fuchsberg went on to discuss what obviously is the impact of failure to disclose an informant's identity in such situations where the issue is guilt or innocence rather than as in the instant case where the issue is probable cause sufficient to support an application for a wiretap order.

This Court finds and holds that the defendants have failed to demonstrate any factual basis for their demand that the informant's identity be disclosed. And under the Court of Appeals' rulings in Goggins and Brown, the Court sees no need to have disclosed the informant's identity to defense counsel or defendants. This Court, therefore, finds that the warrant dated May 22, 1973 was issued upon a proper finding of probable cause. And additionally that there was no need to disclose the identity of the informant.

Now, defendant Massa, through counsel, further contends that the warrant issued April 18, 1974 permitting the interception of telephone communications over telephone number 456-9629 was issued without any showing of probable cause that he was the individual engaged in specified illegal criminal conduct.

An examination of Exhibit 14-0 discloses that it is an affidavit executed by Lieutenant Kennedy on April 18, 1974 and was submitted in support of the warrant which was issued on that date. Lieutenant Kennedy, in his affidavit, sets forth three separate telephone calls in which illegal gambling activities are discussed.

He detailed a conversation that occurred on April 5, 1974 between Sonny and one called Louie also known as Mikie and also known as Michael Fusco. Sonny telephone Louie at 456-9029 and they discussed the odds on several sporting events. Louie informed Sonny that he had received many bets on the New York Knickerbocker basketball game and that they had lost $740. the night before.

At the hearing Lieutenant Kennedy was cross-examined by counsel for defendant Massa. Lieutenant Kennedy stated that he listened to the tape recording before he signed the affidavit; that he was able to identify the voice on the tape referred to as Sonny as being the voice of the defendant Massa; that he was able to make this identification even though Massa did not identify himself during the telephone conversation.

He further testified that he never heard or spoke to Massa personally prior to submitting the affidavit and that he had listened to other tapes and decided that the voice on the other tapes was the same as the voice recorded on April 5, 1974. When asked specifically how he was able to identify the voice as being the voice of Sonny Massa, Lieutenant Kennedy stated, and I quote, "From other tapes made previous and they were identified to me by people who I believe heard Sonny Massa speak in different locations, and it was general knowledge in the office what was Sonny Massa's voice."

Furthermore, a Justice of this Court issued warrants on December 14, 1973, January 17, 1973, February 15, 1974, March 15, 1974 permitting the interception of communications of the defendant Sonny Massa finding that there was probable cause to believe that he and others were engaged in the crimes of promoting gambling and possession of gambling records. All those warrants were issued upon the supporting affidavit of Captain William Carney who set forth in detail in his affidavits numerous illegal activities which have been intercepted between the defendant Sonny Massa and other individuals.

It is a well-settled rule that, and I quote, "Identification of a voice whether heard first hand or through mechanical or electronic transmission or recording, may be made by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." United States v. Bonanno, 487 Fed. 2d, 654, at Page 659.

This Court, therefore, concludes that there was probable cause to believe that Lieutenant Kennedy properly identified the voice of the defendant Sonny Massa and that there was probable cause for the issuance of the warrant, dated April 18, 1974.

I have discussed probable cause and a number of other contentions by the defendants pertaining to the issuance of the warrants involved herein. I now address myself to some of the issues which really relate to either the implementation for the conduct of the District Attorney subsequent to the issuance of the warrants.

In terms of implementation this Court will first address itself to the defendants' contention that the law enforcement authorities failed to conduct the Court authorized interceptions in accordance with Section 700.30, subdivision 7 of the Criminal Procedur Law, in that they failed to properly minimize conversa tions which were not subject to lawful interception, namely, conversations that were either non pertinent to the investigation or conversations that were privileged by statute.

Now, Section 700.30 of the Criminal Procedure Law entitled "Eavesdropping Warrants; Form and Content" and provides in part as follows: "An eavesdropping warrant must contain;" Subdivision 7 provides that, "The authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article," and of "in so far as is pertinent to this issue."

At the hearing Captain William Carney testified that he was previously commanding officer of the Brooklyn North Public Morals Division from January 30, 1973 until February, 1975; that he signed all the affidavits in support of the eavesdropping warrants except Exhibits 9, 11C and 14-0; that each one of these affidavits was truthful to the best of his knowledge; that prior to the commencement of the wiretaps he was instructed by Assistant District Attorney David Freundlich on how minimization was to be effected; that he, in turn, instructed his personnel assigned to the unit with which he worked, the same information he received from Assistant District Attorney Freundlich; that he reviewed both the tapes and the line sheets to determine whether his subordinates were complying with the minimization instructions; that on occasion he reprimanded one of the officers for not following his instructions as to how monitoring was to be conducted; that on some occasions his agents monitored what he believed was a personal call while at other times they would not monitor a conversation which he believed was a criminal call; that because of these facts he re-instructed his men as to the proper procedure; and that copies of the tapes were taken to the District Attorney's office on a daily basis.

The minimization requirement is satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could do to avoid unnecessary intrusion." United States v.Tortorella, 480 Fed. 2d, 764, at Page 784, 2nd Circuit, 1973, cert. denied, 414 U.S. 866.

In United States v. Focarile, 340 Fed. Supp. 1033 at Page 1047, Judge Miller stated, and I quote, "What is reasonable, practicable or feasible depends upon the facts and circumstances in each case. It is certainly unreasonable and goes beyond the limits of practicability or feasibility in every case to give a seizing officer what the Berger Court characterized as a roving commission to seize any and all conversations.

"388 U.S. at 59, 87 Supreme Court at 1883. But it is not unreasonable to recognize that it is much easier to describe with particularity in a warrant the nature and contents of a physical object than a conversation which has not yet been heard.

In the former case the law enforcement officer, can, by sight and touch, generally determine before he takes the item into his custody whether it is something which he is authorized to seize by the warrant while in the latter case he can generally determine with exactness whether the conversation is authorized to be seized by the warrant only when he has already taken it into custody by having heard it in its entirety."

In United States v. Bynum, 485 Fed. 2d, cert. denied, 96 Supreme Court 357, the agents monitored and recorded seventy three 'phone calls between Bynum's infant's baby sitter, [illegible] and her friends and classmates which were innocent in nature.

The Court, nevertheless, found no violation of the warrant minimization provision when it stated as follows, "assuming arguendo that there was a total interception of all of Donna's calls, we do not find a violation of the statute or any constitutional infirmity in their interception. Our own examination of the logs supports the contention that Donna's conversations with friends were banal. And for the most part devoid of content which would assist the investigation in issue.

"Of course, in making this retrospective judgment that the Donna calls were innocent, we enjoy the acuity of hindsight. United States v. LaGorga (336 Fed. Supp. 190 at 196). While such conversations might well commence with teenage trivia, the eavesdropper, unless possessed of the prescience of a clairvoyant, could hardly predict when they might be interrupted by an adult with more pressing problems."

In United States v. Quinta, 508 Fed. 2d 867 at Page 875, the Court stated, and I quote, "It is obvious that no electronic surveillance can be so conducted that innocent conversations can be totally eliminated. Before a determination of innocence can be made there must be some degree of eavesdropping.

"If many calls are a very short duration" in a case of such wide ranging criminal activity as this, "it would be too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation as merely social or possibly tainted."

After considering the authorities cited herein, this Court holds that the agents and law enforcement officers were properly instructed as to the manner in which the communications were to be monitored and that they did, in fact, comply with the minimization provision. The fact that a number of non-pertinent calls were intercepted was unavoidable due to the scope of the criminal conspiracy involved herein and the fact that the agents are not possessed of that quality of prescience to be able to know in advance with certainty from the beginning of a conversation, the path that the entire conversation will take. Such a task is most difficult if not impossible.

Even were this Court to hold that there was, in fact, a failure to properly minimize the conversations that were overheard pursuant to these warrants, it would reach the same result. I want to make sure you understand that the Court does find that there was compliance with the minimization requirement of the statute and of the warrants involved herein. But if the Court had held that there was, in fact, failure to properly minimize conversations, then the issue which would be presented for this Court's determination would be the question as to the appropriate remedy to be used where there has been a failure to minimize.

That, of course, is the issue as to whether or not there should be total suppression of all intercepted conversations or should the doctrine of selective suppression be applied, namely, that suppression should only be pertinent to those conversations which are non-pertinent or immaterial or irrelevant to the crimes being suppressed.

Now, at this time, I do not intend to go at great length into that aspect of the law since I have found and hold that minimization requirement was complied with andthat minimization in fact did take place in so far as could be reasonably required. However, I refer counsel to this Court's opinion, People v. Vario which was printed in the New York Law Journal on July 1, 1976, Page 13, column 3 where this Court went into this issue of total suppression as against selective suppression in great detail and in depth.

I might briefly note, parenthetically, that the issue of minimization and the remedy where minimization has, in fact, not been complied with, poses to this Court's judgment a most serious problem of countervailing conversations. And I repeat that I have expressed my views in People v. [illegible]. I might also add, parenthetically, that this Court had occasion to testify before the National Commission on Wiretapping in Washington, D. C. And I expressed strong reservation about the present law as it pertains to minimization both in terms of the statutory provisions and the problems that it creates for law enforcement officials in the first instance and for Courts in the second instance when those issues are presented in the Courts.

Now, defendants further contend that suppression should be had in this case because the People have failed to comply with Section 700.50, Subdivision 3 of the Criminal Procedure Law by reason of the failure to give timely notice of the interceptions. Section 700.50 entitled, "Eavesdropping Warrants; Progress Reports and Notice" provides in part as follows: Subdivision 3. "Within a reasonable time but in no case later than ninety days after termination of an eavesdropping warrant or expiration of an extension

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order *** written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the persons named in the warrant and such other parties to the intercepted communications as the Justice may determine in his discretion is in the interest of justice. ***"

In the instant case all of the defendants except Specie and Conway received notice. The District Attorney concedes that said notices were not in the exact language required by the statute. The defendants were not timely served within the statutory 90-day period with reference to some of those thirteen plants that were involved in these wiretaps. Nevertheless, the defendants, other than Specie and Conway, did receive ample notice which permitted them to participate in this suppression hearing as did the defendants Specie and Conway.

In People v. Hueston (34 N.Y. 2d, 116 at Page 122) Judge Rabin, writing for a unanimous Court, while deciding the issues therein on other grounds, stated as follows: "Furthermore, it appears that the purposes served by the notification requirement are, first, to publicize wiretaps to assure the community that eavesdropping techniques are reasonably employed and that at least the subject will eventually learn of them (Senate Report Number 1097, 90th Congress, 2d Session, U.S. Code of Congressional and Administrative News, Page 2194 (1968) (regarding purpose of notice in Federal Statute)); and second, to allow defendants in criminal actions to test the legality of the wiretaps by making timely motions to suppress evidence.

The motion dated September 26, 1973 evidencing the defendants' knowledge of the wiretap indicates that both of the purposes behind the notification requirement have been accomplished as to these defendants.

Under these circumstances, we do not believe any useful purpose would be served by a holding which hinged the admissibility of evidence upon a prosecutor's handing a formal written notification to a defence attorney who is already in possession of the information contained therein."

United States v. Rizzo (492 Fed. 2d 443 at Page 447) Judge Oakes, writing for a unanimous Court states as follows: "We believe, as indicated in

U.S. v. Manfredi at 601 that the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the defendant.

"See also People v. DiLorenzo, 69 Misc. 2d, 645. Here, no claim of actual prejudice has been made nor do we see how it could be made, thus, we find that the District Court did not err in admitting evidence of that one telephone call."

All of the defendants herein except Speone and Conway received notice far more than ten days prior to the commencement of the suppression hearing pursuant to CPL Section 700.70. Absolutely no evidence has been presented to this Court that any of the defendants has been prejudiced because he received delayed notice of the fact that his conversations were intercepted. Nor does this Court perceive that any of these defendants were prejudiced where they had received notice more than twelve months prior to the commencement of the within suppression hearing.

This Court, therefore, concludes that this contention is lacking in merit.

Now, the Court noted, by the way, the point made by defense counsel about the proceedings before the

Grand Jury. The Court holds the position that that type of prejudice which it is claimed was suffered by the defendant is not the kind of prejudice which was contemplated by the Appellate Court's principle referred to earlier in terms of the trial itself. This Court believed that such prejudice pertained to the question of prejudice at the time of trial or a suppression hearing prior to trial.

Now, defendants further contend that the evidence obtained by the use of the eavesdropping warrants should be suppressed since the warrants were issued in violation of the Fourth Amendment. Specifically, the defendants contend that the failure to provide for the judicial scrutiny of the tape recordings transformed the eavesdropping warrants into general warrants which are expressly prohibited by the Fourth Amendment. Now, Article 700 of the Criminal Procedure Law contains no such requirement. And this Court finds that argument to be totally devoid of merit.

I might say, parenthetically, that it might be a desirable practice for judicial scrutiny to be exercised. And I will further note that as a result of the experience that this Court has had in presiding at hearings pertaining to wiretap warrants, that this

Court intends, in all instances where it may sign any wiretap warrants or orders, to conduct judicial scrutiny. However, I repeat, that there is no requirement under the law either in statutory form or in case law for such principle.

The basic purpose of the Fourth Amendment is to safeguard the privacy and the security of individuals against arbitrary intrusions by Government officials. However, only unreasonable search and seizure and unreasonable interceptions of the telephone communications are prohibited. (People v. Gnozzo 31 N.Y. 2d 134).

Pursuant to Criminal Procedure Law Section 700.40, an unlimited number of extensions is permitted but only upon a separate showing of probable cause for each extension. The Court again here would note that before this Court would sign a large number of extensions for an initial order, the Court would exercise very close scrutiny to determine whether or not there is a true basis for a continuing intercept of communications over a particular telephone so that it would not, in effect, become a general search.

The Court finds in the instant matter that with regard to each application presented to the justice who continued the particular warrant or order that such facts were placed before the Court so that, in fact, probable cause did exist for the signing of the original order and then for the signing of the various extensions or renewals of the original order.

With reference to the [illegible] Tap, it is clear that the information which the wiretaps were designed to elicit, namely, the identity of all the members of the conspiracy had not been determined during the first thirty days of these interceptions.

It is apparent from the reading of the orders and subsequent extensions that while probable cause may have existed for the arrest of certain of the defendants after the initial thirty days, that the trial of that particular conspiracy did not end at that point. See United States v. Lanza, 341 Fed. 405, Page 419 and 420. "The supporting applications clearly demonstrate that justification for the interception had not terminated and hence that there was probable cause for extending the orders." United States v. Carubia, 377 Fed. 1099 at Page 1104.

Since each of the individual warrants were not given for and did not exceed the period of thirty days, there was compliance with the statutory provisions and the requirements under Berger v. New York heretofore cited. Thus, the Court finds that there is no merit to defendant's argument; that there is a requirement that the Court judicially monitor the wiretap during its period when it is operative.

Counsel for defendants also requested that this Court consider the issues raised in the memorandum of law submitted by the defendants' attorneys in the case of People v. Cirillo, et al, indictment number 2146 of 1974. That brief concerned itself with the initial five eavesdropping warrants which preceded the issuance of the first eavesdropping order affecting the Bushwick Democratic Club on May 22, 1973 and pertaining to telephone number 497-9616.

The defendants contend that if any one of the prior five eavesdropping orders is invalid, then the warrant affecting the Bushwick Democratic Club issued on May 22, 1973 and all warrants thereafter are invalid under the doctrine of the fruit of the poisoned tree.

This Court has carefully examined the issues raised in the memorandum of law submitted in the case of the People v. Cirillo and finds them devoid of merit. When I refer to "memorandum," I am referring to, of course, defense counsel's memorandum.

And lastly, the Court will now address itself to the defendants' contention that the People failed to comply with Section 700.50, Subdivision 2, in that they failed to have the tape recordings of the intercepted communications sealed "immediately" after the expiration of the eavesdropping warrants.

Section 700.50 entitled "Eavesdropping Warrants; Progress Reports and Notice" provides in part as follows: Subdivision 2, "immediately upon the expiration of the period of an eavesdropping warrant, the recording of communications made pursuant to Subdivision 3 of Section 700.35 must be made available to the issuing Justice and sealed under his directions."

The Court has prepared a chart showing the plant number, the number of the telephone that was tapped, the date that the eavesdropping terminated and the date that the tapes were sealed by the Court, and the period of delay in sealing from the expiration of the last order affecting that telephone. And I will set them forth in the record so there will be no doubt about it.

Plant number one on telephone number 497-9617 had a termination date of the first warrant of June 20,

1973. The eavesdropping, in fact, terminated on July 20, 1973. And the date of sealing those recordings was August 14, 1973. And the delay in sealing from the expiration of the last order was twenty six days.

Plants two and three pertain to telephone numbers 382-9888 and 9889. The first warrant terminated July 13, 1973. The eavesdropping terminated December 10, 1973. The date of sealing was March 5, 1974. The delay consisted of eighty five days.

Plant four, telephone number 456-9551, termination date of first warrant, August 8, 1973. The eavesdropping terminated September 7, 1973. Date of sealing, October 19, 1973, a delay of forty two days.

Plant five, telephone number 366-5316, termination date of first warrant September 25, 1973. The eavesdropping terminated September 25, 1973. The sealing took place on October 19, 1973, a delay of twenty four days.

Plant six, telephone number 384-8073. Termination date of first warrant October 23, 1973. The eavesdropping terminated October 23, 1973. Sealing took place December 14, 1973. A delay of fifty two days.

Plant seven, telephone number 497-9617. Termination date of first warrant, November 17, 1973. Eavesdropping terminated February 15, 1974. Date of sealing, February 22, 1974. The delay in sealing from the time of the last actual wiretapping of that telephone was seven days.

Plant number eight, telephone number 381-6785. Termination date of first warrant, January 4, 1974. Eavesdropping terminated January 4, 1974. Date sealed, February 1, 1974. A delay of twenty eight days.

Plant nine, 366-9345. Termination date of first warrant, January 15, 1974. The eavesdropping terminated January 15, 1974. Date of sealing, February 1, 1974. A delay of seventeen days.

Plant ten, telephone number 456-9629. Date of termination of first warrant, January 17, 1974. The eavesdropping actually terminated May 18, 1974. Date of sealing, July 23, 1974. A delay in sealing, sixty six days.

Plant number eleven, telephone number 452-9878. Termination date of first warrant, January 26, 1974. Eavesdropping terminated January 26, 1974. Sealing took place on April 2, 1974. A delay of sixty six days.

Plant number twelve, telephone number 326-7379.

Termination date of first warrant, February 7, 1974. Eavesdropping terminated February 7, 1974. Sealing took place on August 13, 1974. A delay of 187 days.

Plant thirteen, telephone number 835-4819. Termination date of first warrant, March 20, 1974. Eavesdropping terminated March 20, 1974. Date of sealing, August 13, 1974. A delay of 146 days.

In People v. Nicoletti, 34 N. Y. 2d, 249, eavesdropping commenced on March 12, 1970 and terminated on March 30, 1970. Upon the termination of the wiretap, the tape recordings of the intercepted communications were kept in a locked foot locker in the residence of a detective until May 8, 1970. At that time they were delivered, in the locked foot locker, to the District Attorney at the Niagara County Courthouse. Only two persons had the combination to this foot locker, namely, the detective and the District Attorney. The District Attorney conceded that the tape recordings were never sealed.

Judge Jasen, writing for a unanimous Court, stated at Page 253 as follows: "The sealing requirement is to be strictly construed and it is not the defendant's burden to come forward with evidence of tampering when unsealed recordings are sought to be introduced into evidence. The purpose of the requirement is at least three-fold: To prevent tampering, alterations or editing; to aid in establishing the chain of custody; and to protect the confidentiality of the tapes. See United States v. Poeta, 2d Circuit, 455 Fed. 2d, 117, 122, cert. denied 406, U. S. 948; United States v. Kohne, D.C., 358 Fed. Supp. 1053, 1058, affirmed 3rd Circuit, 485, Fed. 2d, 682; see also American Bar Association, project on minimum standards for criminal justice; standards relating to electronic surveillance, final draft (1971), 52.3, Subdivision (b); Sections 4.2, 5.13, 5.14 and commentary.)

"Of these, the first is perhaps of greatest concern. Tape recorded conversations lend themselves to 'diabolical fakery' (Lopez v. United States, 373, U. S. 427, 468 - 469; see also Dash, Schwartz and Knowlton, the eavesdroppers (1959) at Page 368.))

"Through skillful editorial manipulation, alterations may be undetectable, or if detectable at all, then only by the most sophisticated devices and techniques involving time consuming and expensive analysis by technical experts. While not foolproof, feeling reduces the risk of such manipulation to tolerable limits.

"Measured against the potential for abuse, the explanations offered in this case are patently insufficient."

In People v. Sher (38 N. Y. 2d 600) decided February 8, 1976, our Court of Appeals once again had occasion to consider the requirements of the Criminal Procedure Law Sections 700.50, Subdivision 2 and 700.65, Subdivision 3. In that case the District Attorney, without a Court Order, unsealed the tapes two or three days prior to trial "for the purposes of this trial," Page 602.

Judge Jasen, writing for a unanimous Court stated at Page 603: "In People v. Nicoletti (34 N.Y. 2d, 249, 253), we held that the sealing requirement must be strictly construed. The need for rigid adherence to the statutory procedure is explained by the history of our present wiretapping provisions." And then Judge Jasen went on to set forth the history of the statutes.

And then he went on to state as follows: "The People contend, on this appeal, that the absence of the seals is sufficiently explained by the need to use the tapes to prepare for trial. Bearing in mind the purpose and intent of the ceiling requirement, we conclude that this excuse is unsatisfactory.

"In our view, the failure of the prosecution to obtain judicial approval for the unsealing of the tapes and the absence of judicial supervision over the unsealing process violated the procedure clearly mandated by the Federal and State statutes.

"As in People v. Nicoletti, previously cited, no claim is made nor is any indication that the tape recordings involved were in any way altered. And it is a potential for such abuse to which we address ourselves. Sealing reduces the risk that skillful editors might make alterations that are undetectable without the use of technical experts and sophisticated, expensive electronic equipment. Moreover, the requirement also assists in establishing a chain of custody and serves to protect the confidentiality of the tapes."

At Page 605 Judge Jasen stated as follows: "The sealing requirement was designed to prevent the abuse of wiretap recordings. To that end, as we held in Nicoletti, the requirement must be strictly construed. The burden is on the prosecution to establish due compliance with the statutory procedures. We adhere to the rule announced in Nicoletti."

In United States v. Giganti (75 C.R. 94) the Government offered no evidence of any excuse whatsoever regarding the reason why there was a delay of several months, and in some cases more than a year, before the tapes were taken to the issuing judge for a sealing order. There was no evidence that the tapes were tampered with or altered during the time of the delay or at any other time.

Furthermore, the evidence disclosed that the tapes were sealed by the F.B.I. after recording and that the seals were maintained appropriately until the time of the hearing. Judge [illegible], in his decision, held that [illegible] did not comply with the statutory requirement that sealing be done immediately. The Court, therefore, suppressed the evidence obtained under all of the wiretaps because of the Government's failure to comply with Section 18 U.S.C. 2518(8)(a).

On [illegible], 1976 upon appeal in the Giganti case, that Court held, and I refer to "that Court," of course I am referring to the 2nd Circuit Court of Appeals, that due to the extensive delays in presenting the recordings derived from the last six wiretap orders to the issuing judges and in the absence of a satisfactory explanation for these lapses, that the order of Judge Griesa suppressing that evidence should be affirmed.

Judge Kaufman, writing for a unanimous Court, stated as follows: "We are called upon to determine whether the Government's conceded failure to punctiliously observe one of those procedures -- the requirement of 18 U.S.C. Section 2518 Subdivision 8A that wiretap evidence be presented for judicial sealing 'immediately' upon the expiration of the authorizing order which produced them -- requires the suppression of the evidence when judicial supervision of such sealing is delayed.

"In light of the statute's clear language and the serious peril it was designed to avert, our answer must be in the affirmative."

Then Judge Kaufman went on to develop the Legislature's history and the Congress' intent in acting the restrictions contained in title 3.

Then, in so far as is pertinent to the issue before this Court at this time, Judge Kaufman went on to say as follows: "Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected. The judicial sealing requirement, therefore, provides an external safeguard against tampering with or manipulation of recorded evidence. The sealed tapes become confidential Court records and cannot be unsealed in the absence of a subsequent order. When these safeguards are compared with the haphazard procedures employed in this case, the wisdom of Congress becomes manifest."

In United States v. [illegible] (74 C.R. 289 for the Southern District of New York) decided on November [illegible], 1975, Judge [illegible] ordered suppression of intercepted communications where the tapes were sealed on November 3, 1971 where they had remained in an unsealed condition for a period of nineteen days after the expiration of the warrant.

In People v. [illegible] decided by Mr. Justice [illegible] on [illegible] 29, 1975 (Supreme Court, Kings County, unreported decision) the Court ordered suppression of the intercepted telephonic communications where there was a delay in sealing the tapes for a period of ninety days from the expiration of the original order and a delay of at least one month from the expiration date of the last renewal order.

The Court is also aware of the ruling in the case of People v. Guenther (81 Misc. 2d, 258) by Judge Cassetti where he too ruled on the issue of the interpretation of the immediacy requirement and therein Court suppression of intercepted communications where there had been a delay of seven days before the tapes were taken to a Judge to be sealed.

In People v. Simmons (378 N.Y. 2d, 263) Judge Gorman granted a suppression of the intercepted communications where there has been a delay in sealing the tapes and such delay ranged from twenty one days to one hundred ninety days.

Judge Gorman in his opinion noted that the only exception to this series of decisions, which this Court has referred to, was the case of United States v. Falcone, 505 Fed. 2d, 478, 3rd Circuit, cert. denied. In all other instances the courts took the position that where there was a lengthy delay in sealing that there was a failure to comply with the statutory requirements.

In the instant case the District Attorney offered no reason for the delay in having the tape recordings sealed other than the tape recordings which were obtained from plant seven which pertained to the Bushwick Democratic Club located at 137 Wyckoff Avenue, Brooklyn, New York, telephone number 497-9617.

Plant seven commenced on October 19, 1973 when an eavesdropping warrant was signed by a Justice of this Court. Probable cause for the issuance of that particular warrant was based, in part, as a result of information obtained from plants number two and three which were based on wiretap orders earlier issued pertaining to this investigation.

The final renewal order of the plants number two and three had not expired as of October 19, 1973, the date on which the application was made for the first eavesdropping order at the Bushwick Democratic Club, telephone number 497-9617.

Renewal orders for plant seven were signed on November 16, 1973, December 18, 1973 and January 17, 1974. The final renewal order expired on February 15, 1974. The sealing of the various reels of tape which were obtained as a result of the eavesdropping orders on plant seven, telephone number 497-9617, occurred on February 22, 1974 pursuant to an order signed on that date by Mr. Justice Farshay of this Court.

In determining whether the People had complied with the statutory requirements concerning the duty to seal, the first question for the Court's determination is, when does the obligation to seal arrive? Does the duty to seal the tapes arrive immediately upon the expiration of the original warrant and the determination of the tape recordings under that original warrant or does the duty to seal the tapes arise after the expiration of the last renewal order and the determination of the wiretap on that particular telephone? After careful consideration and much agonizing on this issue, the Court concludes that the duty to seal the tape recordings arises after the termination of the wiretap and the completion of the wiretapping of the particular telephone.

In the instant case, the final renewal order on plant seven expired on February 15, 1974. An examination of the line sheets indicates that the electronic surveillance actually terminated at 10 P.M. on that date which was a Friday. This Court takes judicial notice of the fact that February 16, 17 and 18 of 1974 constituted a three-day holiday week end. Thus, the first working day after the expiration of the final renewal order and the final interception of communications on plant seven, telephone number 497-0917, was Tuesday, February 19, 1974. As mentioned earlier, the tapes were sealed on February 22, 1974 which is the fourth working day after the termination of the tap on plant number seven.

This Court notes that Sections 700.55 through 65 of the Criminal Procedure Law provide for duplicate recordings and their use. The sealing of the original tapes without any delay whatsoever would render performance under these Sections difficult if not impossible.

This Court holds that despite the delay in sealing the tapes on plant seven for the period of approximately seven days from the expiration of the last wiretap, the District Attorney has adequately explained the delay for that period of time. And the Court further finds and holds that there was substantial compliance with the statutory requirement for immediate sealing of the tape recordings of communications intercepted on plant seven for telephone number 497-0917.

The Court further finds that the District Attorney offered no explanation for the delay in having any of the other tape recordings which were intercepted as a result of the twelve other plants and all of the other wiretap orders pertaining to the other telephones sealed.

This Court, therefore, finds and holds that the delay in sealing the tapes from the expiration of the last wiretap order with regard to the twelve other plants, that is other than plant number seven, ranged from a period of seventeen days to one hundred eighty seven days. And that, therefore, the People have failed to comply in all ofthose instances with the statutory requirement which necessitates that the tapes be sealed immediately under Section 700.50, Subdivision 2.

And, therefore, the Court directs that all the communications intercepted on these twelve plants are to be suppressed.

Now, with regard to plant number seven, the Court further finds that although probable cause for the warrant for plant number seven was based upon information obtained from plants number two and three which were not subsequently properly sealed, that the fact that such tape recordings were not properly sealed subsequently is irrelevant as to the issue of probable cause with regard to plant number seven.

At the time that the first eavesdropping order was issued for plant number seven on October 19, 1973, plants number two and three were still functioning under a validly issued warrant, and they did not terminate until December 7, 1973. The information obtained from plants number two and three were properly sealed at the time that they were seized and, therefore, could properly be utilized as a factual basis to establish probable cause for plant number seven at the time that the wiretap order for plant number seven was signed.

Accordingly, the motion to suppress all of the intercepted wiretap communications is granted as to all plants except plant number seven and alternate seven and evidence derived from those twelve plants are hereby suppressed.

With reference to number seven, telephone number 497-2617 assigned to the Bushwick Democratic Club located at 137 Wyckoff Avenue, Brooklyn, New York, the motion to suppress is denied.

To the extent that it might be helpful to the parties involved, the Court will now set forth on the record the names of the defendants whose communications were, in fact, intercepted over plant number seven, telephone number 497-9617, and also set forth the names of the defendants whose conversations were not intercepted over plant number seven.

First those who were intercepted over plant number seven: 1, Anthony Mangiaracina; 2, Steven Maltese; 3, Giorlando Catalano; 4, Salvatore Arezzi; 5, Robert DeMartine; 6, James Flynn; 7, Joseph Bivona; 8, John Barbella; 9, Gasper Liveri; 10, Andy Pecoraro; 11, Frank Panneca; 12, Joseph Spione; 13, Robert Sampogna; 14, Frank Cucumano; 15, Vincent Bonura; 16, John Turchiano; 17, Richard DiGioia; 18, Larry Alfano; 19, Frank [illegible]; 20, Salvatore Viola; 21, Sonny [illegible]; 22, David [illegible]; 23, Kifren Sullivan; 24, Joseph Gallegro; 25, Anthony Veltri; 26, James Rotola; 27, Regina Henderson; 28, Salvatore Ferrante; 29, Philip Albergo; 30, Carmill Ilaquia.

Now, the following defendants were not intercepted over plant number seven: 1, Casper Cammarato; 2, John Scotti; 3, Edgar Ristau; 4, Thomas Blanche; 5, Daniel Kilgallin; 6, Mary Kilgallin; 7, Rosario Guida; 8, Vincent Cardaci; 9, John [illegible]; 10, Henry McGrath; 11, Joseph [illegible]; 12, Patricia Ristau; 13, Marianne [illegible]; 14, Joe Varsilona; 15, James Catapano; 16, Anthony Viola; 17, Anthony [illegible]; 18, Richard [illegible]; 19, Anthony Guida; 20, Joseph [illegible]; 21, Dominick Caputo; 22, Vincent Cascio; 23, Charles Abuzzo; 24, Richard Burrow; 25, Benedetto Aloi; 26, Angelo Termine; 27, Philip [illegible]; 28, James Rubino; 29, Anthony Calandra; 30, Anthony [illegible]; 31, Vincent [illegible]; 32, Stanley [illegible]; 33, [illegible] Green; 34, Joseph Giana 35, [illegible] Percito; 36, Michael Fusco; 37, Carmine [illegible].

The foregoing constitutes the decision of this Court with regard to this hearing. I would like, before I conclude this session, to make one statement. I feel I would be remiss if I did not say so.

I want to express my deep appreciation to all counsel involved on both sides of the issue for their [illegible] cooperation throughout the hearing and in the research which followed the hearing.

I have rarely had presented to me for consideration memoranda of law which has been as thorough and as competently prepared as were the memoranda which was submitted by all counsel involved. And I appreciate that very much. It has made my task [illegible].

I want to compliment all counsel for being very alert, to ferret out every case no matter how recent they were and bringing them immediately to the attention of the Court and the adversary counsel. I think that the delineation of the various issues was done in an extremely competent manner.

In addition to the delineation of the specific issues, I would like to note in passing one other point. I refer now to the memorandum submitted by Mr. Wischetti, and more particularly,point five of that memorandum which addresses itself to what we might term the underlying philosophy and overall general approach of the defendants to the issues involved in this case. While I do not find myself totally in agreement with the views expressed therein, I do think that it is an excellent exposition of the problems which are created by wiretapping and the vigilance which should be exercised by both law enforcement officers and the courts in maintaining that precarious balance between the need to investigate and ferret out organized criminal activities.

And on the other hand to safeguard that very important and precious right of every citizen, the right of privacy and freedom of invasion from their right of privacy. It's a very difficult balance and I think that the presentation of the problem is excellent.

Again, my appreciation and thanks to all counsel involved.

MR. ZE[illegible]IN: Your Honor, will it be necessary to serve an order upon the District Attorney? What I am thinking of is limited, quite frankly and openly, the limited time in which the District Attorney makes the decision with regard to those persons who, at least we know are not at all overheard on point seven. If they intend to appeal, they will appeal. If they do not intend to appeal, I would like to limit it to thirty days or shortly thereafter for the dismissal of the [illegible].

THE COURT: I would like to do this, if we can. I think it will be helpful to the Court and the calendar and it should be helpful to counsel, I would like to put it over for a reasonable period, say, two weeks approximately and have the District Attorney at that time indicate to the Court and counsel whether they intend to appeal from the Court's determination with regard to the suppression of all evidence other than the evidence obtained on plant number seven.

If they do not intend to appeal, and assuming further that they intend to consent to the dismissal of certain numbers of the limited indictment, it would save a good deal of paper work and time for all involved. And then we can proceed.

And then we will set it down for trial, those cases which the District Attorney intends to proceed with in the face of the Court's ruling.

First, do we agree that that procedure makes sense and is satisfactory to all counsel?

MR. FISCHETTI: It is to us.

MR. SIMON: It is if we don't have to serve an order. If we don't have to serve an order, it would save us a great deal of paper work and time.

MR. KAROUNIAN: May I have a moment?

THE COURT: Yes.

(A short pause.)

THE COURT: Now, the Court having ruled, we must now come to a decision as to whether we will proceed to trial and, if so, as to which defendants. And that would depend to some extent as to what the District Attorney's position is with regard to an appeal from this Court's ruling.

It has been agreed by all counsel that this matter should be adjourned to July 29. And at that time, hopefully, the District Attorney will be in the position to indicate to this Court whether or not the District Attorney's office intends to appearl from the Court's ruling.

Of course, the defense counsel have the right to appeal from that portion of the Court's ruling which they find disagreement with.

And that they will take whatever safeguards necessary to protect the defendant's rights until the order is served. The time will not begin to run in any event.

I hereby certify that the foregoing
is an accurate transcript of the
minutes taken during the above-
captioned proceedings.

Official Court Reporter

ROSNER ROSNER & McEVOY
ATTORNEYS AT LAW
6 EAST 43RD STREET
NEW YORK, N. Y. 10017

(212) 661-2150

February 25, 1976

Mr. Lawrence Alfano
64-52 Madison Street
Ridgewood, Queens, New York 11137

Re: *United States v. Alfano*

Dear Larry:

It troubles me to write a letter like this to a client, but I must state to you that you have broken virtually every promise which you made to us, starting with your assurance that you would pay our fee prior to the actual commencement of trial, and continuing on through your assurance that we would receive the payment not only for trial but for the appeal prior to having to pay for the trial transcript.

We have now had to pay for the transcript and the docket fee for the Court of Appeals and you have not finished paying us the trial fee and have paid nothing in respect of the appeal, either by way of fee or disbursements. There is presently an outstanding balance of some $1,278.42 for trial and disbursements and another $5,000. for the appeal, or a total of $6,278.42.

Perhaps this is the way you conduct your own affairs all of the time, although I must tell you I have never had a similar experience in representing persons accused of crimes in the past, and must conclude that your manner of operating bespeaks your own experience. We shall complete the appeal on your behalf since we have indicated to the Court we will do so, although I must state that I do not do it with any great degree of interest, and also indicate that we will not, under any circumstances, engage in any post-appeal motions which we had earlier discussed, in the event your conviction is affirmed. There is no need to call me to discuss this since I do not want to hear any more promises which you will break: If you have anything to say it should be in the form of a check or cash.

Most sincerely,

Jon

JONATHAN L. ROSNER

JLR:bh
cc. Herbert J. Kaplain, Esq.

Ex E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against- : Docket No. 75 Cr. 298

LAWRENCE ALFANO,

Defendant.

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LAWRENCE ALFANO,

Petitioner,

-against- : Docket No. 76 C 1619

UNITED STATES OF AMERICA,

Respondent.

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JONATHAN L. ROSNER, being duly sworn, deposes and says:

1. I am admitted to practice law in this Court and am a member of the Firm of Rosner McEvoy & Stebel (formerly Rosner Rosner & McEvoy). Heretofore we represented the Defendant-Petitioner Lawrence Alfano subsequent to the filing of Indictment 74 Cr. 318 and its successor Indictment 75 Cr. 298.

2. I have been allowed to read the application herein on behalf of the Defendant-Petitioner Alfano as well as the Memorandum and Order of this Court dated December 21, 1976, and the Office of the United States Attor-

BEST COPY AVAILABLE

ney for this District has afforded me the opportunity to submit this affidavit in respect thereto.

3. I first met the Defendant-Petitioner subsequent to the filing of Indictment 74 Cr. 818 when he was brought to our office by Herbert J. Kaplain, Esq., an attorney who was representing Mr. Alfano in state court proceedings and who requested that we represent him in this Court. During that initial meeting Andrew T. McEvoy, Jr., Esq. and I, from our office, discussed the matters with Mr. Alfano and Mr. Kaplain and obtained relevant information from them, subsequent to which we undertook representation of Mr. Alfano and prepared motions, engaged in conferences, interviewed prospective witnesses and prepared for trial.* Throughout virtually all of the proceedings we received information concerning the state court proceedings from Mr. Kaplain, who represented Mr. Alfano in those proceedings as he had in the Grand Jury proceedings in this Court. Our files indicate that virtually all correspondence with the Defendant-Petitioner was "copied" to Mr. Kaplain and as well virtually all correspondence we received from Mr. Kaplain was "copied" to Mr. Alfano.

4. In response to a concededly broad motion by us addressed to the legality of the electronic eavesdropping involved in this and several related indictments, on May 9, 1975 the Court held a "hearing" (see Exhibit "A" annexed to the moving papers). In Court, at the outset of the "hearing" (which Mr. Kaplain attended together with the affiant, see Exhibit "A", _supra_ at page 18 _et seq._), Government counsel delivered to the attorneys present an impressive quantity of judicial orders and returns bearing upon the eavesdropping involved in the several cases

before the Court. As the present attorney for Defendant-Petitioner Alfano appropriately observes, there was no time whatsoever for particularization of any challenge to the eavesdropping as the Court required, and, as the record indicates, the adjourned date for the "hearing" as fixed by the Court was in conflict with a prior trial engagement which I had and which I then made known to the Court. During the "hearing" the Court evidenced an awareness of the contents of the papers just tendered to counsel as well as a determination by another Member of this Court in the same or a related matter. It is my understanding that subsequent to the adjourned "hearing" which I was unable to attend due to a prior trial engagement, the Court reviewed all of the documents and embodied its determination in a formal Memorandum.

Quite aside from the record itself in respect of the eavesdropping matters involved in this case, as the counsel for Defendant-Petitioner Alfano observed in the instant application the telephone number on the transcript of the conversation which Government counsel expressed an intention to offer on trial did not relate to the telephone number designated on any of the judicial orders submitted to counsel. It was this fact, among others, that caused your affiant repeatedly to observe to the Co[illegible]hat the materials which we had been furnished with appeared to be incomplete and inadequate for the purposes of the applications. Further confirmation of that appeared to come from the fact that during the trial itself, Government counsel learned of the existence of other eavesdropped conversations which it then sought to offer against Defendant-Petitioner Alfano as to which the Court sustained our objections after lengthy argument.

5. I acknowledge responsibility for overlooking the defect now revealed in respect of the eavesdropped conversation received against Defendant-Petitioner Alfano on trial of this matter. Whether that failure on my part is regarded as excusable or not in the context of the confusion in the proceedings is something apart from the matter before the Court: [illegible] did not particularize for the Court the defect in respect of sealing.

6. My failure so to do was, however, in no way occasioned by any financial considerations in respect of our relationship with the Defendant-Petitioner Alfano, a suggestion contained in the moving papers which I reject in its entirety. As indicated, whether the oversight is understandable at this point in time or not, the piecemeal delivery of documents in respect of the eavesdropping, the joint "hearing" conducted by the Court, the subsequent resumption of the "hearing" in my absence, and my inability to cross-reference the telephone number in the transcript of the eavesdropped conversation with any number in the judicial orders delivered to us, were the sole cause for my failure to "fix" on the sealing defect now apparent.

7. Prior to preparation of the brief on behalf of the Defendant-Appellant Alfano I reviewed the record and discussed with other attorneys in our office issues to be presented, including issues relating to the eavesdropping, and a determination was made not to present to the reviewing court any issues relating to eavesdropping. However, since we had not focussed on the sealing defect now apparent that issue was not considered by us, the eavesdropping issues considered being limited to the manner in which the Court disposed of the legality of the

conversation to be offered against Defendant-Petitioner Alfano. Unfortunately, the state court determination was apparently not made until after conclusion of the state court hearings which themselves were not concluded until after trial of Mr. Alfano, and that determination was never communicated to me either before or subsequent to the appeal from the judgment of conviction.*

8. Finally, Mr. Dowd's affidavit in support of this application leaves the impression that we did not turn over papers to him until after we were "paid" $1,[illegible]. While the physical facts are as indicated, an explanation is warranted. At the time that the Court and, thereafter, Mr. Dowd requested the materials in our files there was an outstanding statement due to us from Mr. Alfano for actual out-of-pocket disbursements of $1,[illegible].05, for trial transcripts and printing, and we asked Mr. Dowd to have the Defendant-Petitioner Alfano pay for those disbursements before releasing papers to them. Thus, we did not receive any monies for the release of the papers or for the hours spent with Mr. Dowd, but rather received monies for the actual out-of-pocket disbursements we had advanced on behalf of Petitioner Alfano. To the extent that I communicated to Defendant-Petitioner Alfano by letter dated February 25, 1976 as quoted in the moving papers and this Court's Memorandum and Order that our prosecution of the appeal on his behalf would be without substantial interest, I now regret that my words were not well-chosen but rather the result of a series of broken promises by the Petitioner-Defendant Alfano in respect of our relationship with him. I do say, categorically, that our representation of Defendant-Petitioner Alfano was not in any way the result of his failure

to compensate us for work performed, nor was it affected by our relationship with the Defendant-Petitioner Alfano in any manner other than as heretofore indicated. That defect in the failure timely to seal the eavesdropped conversation was overlooked by me and not called to the attention of the Court and thus not presented to the appellate court for review because of human failure on my part in the context of the proceedings which have already been referred to herein in summary fashion.

JONATHAN L. ROSNER

Sworn to before me this
17th day of January, 1977.

Kathleen M. McNally

KATHLEEN M. McNALLY
Notary Public, State of New York
License #[illegible]
Qualified in Albany County
Commission Expires March 30, 1978

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* Apparently the state court hearings in respect of eavesdropping continued from time to time from in or about May, 1975 through in or about December, 1975, resulting in the order referred to in the moving papers in or about July, 1976, which contrasts sharply with the time afforded the same issues in this Court and the seemingly summary disposition of the issues herein.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENTS
BEARING THE NUMBER
382-9888
382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

ORDER
SEALING RECORDINGS AND
DETERMINING CUSTODY

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It appearing from the annexed application of EUGENE GOLD, District Attorney of the County of Kings, State of New York, sworn to the 4 day of March, 1974, and the papers incorporated therein including the affidavits of CAPTAIN WILLIAM CARNEY, LIEUTENANT MARTIN KENNEDY, SARGEANTS JAMES COCALAS, RICHARD BLACK AND JOHN BRUNKARD, POLICE OFFICERS JOHN CURD, EDWARD MC KAY, LEROY COUNTS working out of Brooklyn North Public Morals District, that on June 14, 1973, an Eavesdropping Warrant was signed by the Honorable HENRY MARTUCELLO, Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Department, permitting the interception of communications of certain unknown individuals transmitted over telephone instruments bearing the numbers 382-9888 and 382-9889 and listed in the records of the New York Telephone Company in the name of CROSSROADS LOUNGE, 53-57 Metropolitan Avenue, Queens, State of New York. Said Warrant was renewed on July 13,1973 by JUSTICE MUNDER, on August 13,1973 by JUSTICE GULOTTA, on September 11,1973 and October 11,1973 by then PRESIDING JUSTICE RABIN and on November 10,1973 by JUSTICE BENJAMIN and terminated on December 10,1973.

Appearing to the satisfaction of the court that tape recordings were made of conversations intercepted over the telephone instrument bearing the numbers 382-9888 and 382-9889 pursuant to the aforementioned Eavesdropping Warrant and it also

Appearing that a code name was assigned to the conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3", and it further

Appearing that the original tape recordings made of conversations intercepted over telephone instrument bearing the numbers 382-9888 and 382-9889 known as "PLANT NUMBERS 2 & 3" were kept under lock and key at all times while in the custody of CAPTAIN CARNEY, and it also

Appearing that the original tape recordings made of conversations intercepted over telephone instruments 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3" have not been altered, changed, nor any deletions made therefrom while in the custody of CAPTAIN CARNEY, and it also

Appearing that the cartons marked "PLANT NUMBER 2, BOX #1, REELS 34-164, 7/18/73-12/3/73; BOX #2, REELS 15-33, 6/29/73-7/17/73; BOX #3, REELS 1-14, 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73 and 11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES 38-173(end) 7/25/73-12/10/73; BOX #3, TAPES 15-37 7/1/73-7/24/73; BOX #4, TAPES 1-14 6/15/73-6/30/73 contain each and every original tape recording made of conversations intercepted over telephone instruments 382-9888 and 382-9889, in an unaltered condition, it is therefore

ORDERED, that the original tape recordings of conversations intercepted over the telephone instrument bearing the numbers 382-9888 and 382-9889 contained within cartons marked PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-

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12/3/73; BOX #2, REELS 15-33, 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6 DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2 TAPES 38-173(end) 7/25/73-12/10/73; BOX #3, TAPES 15-37 7/1/73-7/24/73; BOX #4, TAPES 1-14 6/15/73-6/30/73 shall be and the same hereby are sealed pursuant to Section 700.50 of the Criminal Procedure Law and it is further

ORDERED, that the original tape recordings of the conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889 contained within cartons marked PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES 38-173(end) 7/25/73-12/10/73; BOX #4, TAPES 1-14, 6/15/73-6/30/73 shall be and the same hereby are to be kept in the custody of the District Attorney of the County of Kings.

DATED: Brooklyn, New York

March 5 ,1974.

Associate JUSTICE OF THE SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF E[illegible]E GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, TO [illegible] AND DETERMINE CUSTODY OF RECORDING INTERCEPTED PURSUANT TO AN EAVESDROPPING WARRANT OVER THE TELEPHONE INSTRUMENTS BEARING THE NUMBERS

382-9888
382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

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APPLICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

EUGENE GOLD, being duly sworn, deposes and says:

I am the District Attorney of the County of Kings, State of New York.

This affidavit is submitted in support of an Order sealing recordings and determining custody of recordings of conversations intercepted over telephone instruments bearing the numbers 382-9888 and 382-9889.

I make this application upon information and belief. The source of deponent's information and grounds of his belief in the affidavits of JAMES COCALAS, RICHARD BLACK, JOHN BRUNKARD, MARTIN KENNEDY, JOHN CURD, EDWARD MCKAY, LEROY COUNTS hereto annexed.

On June 14,1974, an Eavesdropping Warrant was signed by the HONORABLE HENRY MARTUCELLO, Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Department, permitting the interception of communications of certain individuals transmitted over telephone instruments bearing the numbers 382-9888, 382-9889, and listed in the records of the

New York Telephone Company in the name of CROSSROADS LOUNGE, 53-57 Metropolitan Avenue, County of Queens, State of New York. Said Warrant was renewed on July 13 1973 by the HONORABLE JUSTICE MUNDER, and August 13,1973 by the HONORABLE JUSTICE GULOTTA. On September 11,1973 and October 11,1973 by PRESIDING JUSTICE RABIN and on November 10,1973 by HONORABLE A. DAVID BENJAMIN and terminated on December 10, 1973.

Pursuant to said Eavesdropping Warrant, conversations were intercepted over telephone instruments bearing the numbers 382-9888 and 382-9889 and said conversations were monitored and tape recordings were made of those conversations permitted by law to be intercepted within the prescribed dates and hours authorized by said Warrant.

As set forth in CAPTAIN CARNEY's affidavit, a code name was assigned to the conversations intercepted over the telephone instruments bearing the numbers 382-9888, 382-9889 and that code is known as "PLANT NUMBERS 2 & 3".

As set forth in CAPTAIN CARNEY's affidavit, all original tape recordings of the conversations intercepted and monitored over telephone instruments bearing the numbers 382-9888, 382-9889 were marked for identification as "PLANT NUMBERS 2 & 3" and kept under lock and key in a secured area within CAPTAIN CARNEY's office. Those original tape recordings were removed from the secured area only for the purpose of making duplicate copies and were removed for that purpose.

Subsequent to the expiration of the Eavesdropping Warrant and duplication of the original tapes, all of the original tape recordings made of conversations intercepted over telephone instruments bearing the numbers 382-9888, 382-9889 were placed in cartons, marked "PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73, BOX #7, DIAL RECORDER,

BEST COPY AVAILABLE

TAPE LANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2,
TAPE 7/25/73-12/10/73; BOX #3, TAPES #15-37 7/1/73-7/24/73; BOX #4,
TAPE -6/30/73, and those cartons were sealed by tape. As set forth
in C affidavit, the tape sealing of those cartons had not been
broken s have been under lock and key.

I believe from the annexed affidavits of Police Officers
JOHN CURD, AY, LEROY COUNTS, Sergeants JAMES COCALAS, RICHARD BLACK,
JOHN BRUNKARD utenant MARTIN KENNEDY, that each and every original tape
recording bear numbers 382-9888 and 382-9889 are contained within the
cartons marked NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2,
REELS 15-33 6/29 /17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL
RECORDER, TAPES /73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73;
BOX #6, DIAL RECOR , TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73", PLANT NUMBER 3, BOX 1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES #38-173(end) 7/25/73-12/10/73; BOX #3, TAPES #15-37 7/1/73-7/24/73; BOX #4, TAPES #1-14 6/15/73-6/30/73, and that those original tapes have not been altered, deleted, tampered with or changed in any manner, shape or form while they have been in the custody of the District Attorney's Office, Kings County.

WHEREFORE, it is respectfully requested that the original tape recordings of conversations intercepted and monitored over the telephone instruments bearing the numbers 382-9888, 382-9889, pursuant to an Eavesdropping Warrant signed on June 14,1973 by the HONORABLE HENRY MARTUCELLO, Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Department and renewed on July 13,1973 by the HONORABLE JUSTICE MUNDER, and August 13,1973 by the HONORABLE JUSTICE GULOTTA. On September 11,1973 and October 11,1973 by PRESIDING JUSTIN RABIN, and on November 10,1973 by HONORABLE A. DAVID BENJAMIN, which expired on December 10,1973, be sealed pursuant to Section

700.50 of the Criminal Procedure Law, and that said original tape recordings be kept in the custody of the District Attorney of the County of Kings.

EUGENE GOLD
District Attorney
Kings County

Swcrn to before me this
4th day of MARCH ,1974.

Sheldon Greenberg
NOTARY PUBLIC

SHELDON GREENBERG
NOTARY PUBLIC, State of New York
No. 30-6647130
Qualified in Nassau County
Certificate filed in Kings County
Commission Expires March 30, 1974

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENTS
BEARING THE NUMBERS

382-9883
382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

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AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

WILLIAM CARNEY, being duly sworn, deposes and says:

I am a Police Officer of the Police Department of the City of New York, with the rank of Captain, assigned to and working out of the Brooklyn Public Morals District, Kings County, North.

On June 14,1973, an Eavesdropping Warrant was signed by the HONORABLE HENRY MARTUCELLO, Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Department, permitting the interception of communications of certain individuals transmitted over telephone instruments bearing the numbers 382-9888, 382-9889, and listed in the records of the New York Telephone Company in the name of CROSSROADS LOUNGE, 53-57 Metropolitan Avenue, County of Queens, State of New York. Said Warrant was renewed on July 13,1973 by the HONORABLE JUSTICE MUNDER, and August 13,1973 by the HONORABLE JUSTICE GULOTTA. On September 11,1973 and October 11,1973 by PRESIDIN JUSTICE RABIN and on November 10,1973 by HONORABLE A. DAVID BENJAMIN and terminated on December 10,1973.

Pursuant to said Eavesdropping Warrant conversations were intercepted over the telephone instruments bearing the numbers 382-9888, 382-9889, and said conversations were monitored and tape recordings were made withi the prescribed dates and hours authorized by said warrant of those conversation permitted by law to be intercepted.

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A code name was assigned to the conversations intercepted over the telephone instrument bearing the numbers 382-9888 and 382-9889 and tha code is known as "PLANT NUMBERS 2 & 3 " respectively.

All original tape recordings of the conversations intercep over the aforementioned telephone instruments were secured in the Brooklyn Nort Public Morals Office, Kings County, marked for identification with "PLANT NUMBE 2 & 3", and kept under lock and key at all times.

Deponent further states that said original tape recordings marked "PLANT NUMBERS 2 & 3" have been removed from the secured area only for the purpose of duplicating said tapes by JAMES COCALAS, RICHARD BLACK, JOHN BRUNKARD, MARTIN KENNEDY, JOHN CURD, EDWARD MCKAY, LEROY COUNTS, as set forth i their affidavits, all of said tapes were placed in cartons marked "PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/7 BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73 BOX #7, DIAL RECORDER, TAPES 6/73-7/73," "PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES #38-173(end) 7/25/73-12/10/73; BOX #3, TAPES #15 37 7/1/73-7/24/73; BOX #4, TAPES #1-14 6/15/73-6/30/73, and said cartons were sealed with tape, and have been kept under lock and key at all times.

Deponent further states that the seals on said cartons marked "PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and "PLANT

NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES #38-173(end) 7/25/73-12/10/73; BOX #3, TAPES #15-37 7/1/73-7/24/73; BOX #4, TAPES #1-14, 6/15/73-6/30/73 have not been broken, and that the two cartons marked "PLANT NUMBER 2, BOX #1, R[illegible] 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1 12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPE 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES #38-173(end) 7/25/73-12/10/73; BOX #4, TAPES #1-14 6/15/73-6/30/73" contain each and every original tape recording made of conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889 pursuant to the aforementioned Eavesdropping Warrant, and that said tape recordings have not been altered, tampered with, or changed in any manner, shape or form while in the custody of the Kings County District Attorney's Office.

Deponent is fully aware of the fact that the District Attorney of Kings County will rely upon the truth of the facts asserted in this affidavit in his request to seal and determine custody of the aforementioned tape recordings.

WILLIAM CARNEY
CAPTAIN

Sworn to before me this
25 day of February, 1974.

NOTARY PUBLIC

[illegible]
NOTARY PUBLIC, [illegible] York
No. [illegible]
Com[illegible]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT
BEARING THE NUMBERS 382-9888, 382-9889
KNOWN AS PLANT NUMBERS 2 AND 3 RESPECTIVELY.

AFFIDAVIT

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STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

WILLIAM CARNEY, being duly sworn, deposes and says:

I am a Police Captain, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, I did remove from a secured room various original tape recordings marked "PLANTS #2 and 3", specifically June 15, 16; June 18 to 26; June 28 to July 4; June 17 and 27, "PLANT #2 only, for the purpose of copying said original tape recordings.

On each occasion after supervising the making of a true and exact copy of the original tapes, I returned the original tapes marked "PLANTS #2 and 3" to the secured room in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

Each and every tape marked Plant Number 2 or 3 which I removed for purposes of duplication was returned to the secured room.

William J. Carney
WILLIAM CARNEY

Sworn to before me this
28 day of February, 1974.

Francesco Marcellino
Notary Public

FRANCESCO J. MARCELLINO
NOTARY PUBLIC, State of New York
No. 41-7703548 - Queens County
Commission Expires [illegible] 1976

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT
BEARING THE NUMBERS

382-9888, 382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

---x

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

MARTIN KENNEDY, being duly sworn, deposes and says:

I am a Police Lieutenant, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by CAPTAIN CARNEY, I did remove from a secured room various original tape recordings marked "PLANT NUMBERS 2 & 3" specifically 11/24 Plants 2 & 3 for the purpose of copying said original tape recordings.

On each occasion after supervising the making of a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 & 3" to CAPTAIN CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

.../

Each and every tape marked PLANT NUMBERS 2 & 3" which I removed for purposes of duplication was returned to CAPTAIN CARNEY and was again secured under the direction of CAPTAIN CARNEY.

MARTIN KENNEDY

Sworn to before me this
[illegible]
1 day of February, 1974.

NOTARY PUBLIC

FRANCESCO J. MARCELLINO
NOTARY PUBLIC, State of New York
No. 41-7707548 - Queens County
Commission Expires March 30, 19

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT BEARING
THE NUMBERS

382-9888, 382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

AFFIDAVIT

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STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

JAMES COCALAS, being duly sworn, deposes and says:

I am a Police Sargeant, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by CAPTAIN CARNEY, I did remove from a secured room various original tape recordings marked "PLANT NUMBERS 2 & 3" specifically 8/4 Plants 2 & 3; 11/3 Plants 2 & 3; 11/9 Plants 2 & 3; 11/16 Plants 2 & 3; 11/23 Plants 2 & 3 for the purpose of copying said original tape recordings.

On each occasion after supervising the making of a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 & 3" to CAPTAIN CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT
BEARING THE NUMBERS

382-9888, 382-9889

KNOWN AS PLANT NUMBERS 2 AND 3 RESPECTIVELY

AFFIDAVIT

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STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

JOHN CURD, being duly sworn, deposes and says:

I am a Police Officer, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by Captain CARNEY, I did remove from a secured room various original tape recordings marked "PLANT NUMBERS 2 AND 3" specifically 7/5 Plants 2 & 3; 7/6 Plant 2; 7/8-7/12 Plants 2 & 3; 7/15-7/19 Plants 2 & 3; 7/23-7/26 Plants 2 & 3; 7/30-7/31 Plants 2 & 3; 8/1-8/2 Plants 2 & 3; 8/5-8/8 Plants 2 & 3; 8/26 Plant 3; 8/27-8/29 Plants 2 & 3; 9/2-9/6 Plants 2 & 3; 9/9-9/13 Plants 2 & 3; 9/16-9/19 Plants 2 & 3; 9/23-9/27 Plants 2 & 3; 9/30 Plants 2 & 3; 10/1-10/3 Plants 2 & 3; 10/14-10/18 Plants 2 & 3; 10/21-10/25 Plants 2 & 3; 10/28 Plants 2 & 3; 10/30-10/31 Plants 2 & 3; 11/1 Plants 2 & 3; 11/4-11/8 Plants 2 & 3; 11/11 Plants 2 & 3; 11/15 Plants 2 & 3; 11/18-11/20 Plants 2 & 3; 11/25-11/29 Plants 2 & 3; 12/2-12/5 Plants 2 & 3; 12/9-12/10 Plants 2 & 3 for the purpose of copying said origin tape recordings.

On each occasion after making a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 AND 3" to Captain CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

Each and every tape marked "PLANT NUMBERS 2 AND 3" which I removed for purposes of duplication was returned by me to Captain CARNEY and was again secured under the direction of Captain CARNEY.

Curd
JOHN CURD

Sworn to before me this
MARCH
1 day of ~~February~~, 1974.

Marcellino
NOTARY PUBLIC

[illegible] MARCELLINO
NOTARY PUBLIC, State of New York
No. [illegible] - [illegible] County
Commission Expires March 30, 1976

A 746

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT BEARING
THE NUMBERS

382-9888, 382-9889

KNOWN AS PLANT NUMBERS 2 AND 3 RESPECTIVELY

AFFIDAVIT

--------------------------------------x

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

EDWARD MC KAY, being duly sworn, deposes and says:

I am a Police Officer, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by Captain CARNEY, I did remove from a secured room various original tape recordings marked "PLANT NUMBERS 2 AND 3" specifically 7/13 Plants 2 & 3; 7/19 Plant 3; 7/20 Plants 2 & 3; 10/7 Plants 2 & 3; 11/12 Plants 2 & 3; 11/21 Plants 2 & 3 for the purpose of copying said original tape recordings.

On each occasion after making a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 AND 3" to Captain CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

Each and every tape marked "PLANT NUMBERS 2 AND 3" which I removed for purposes of duplication was returned by me to Captain CARNEY and was again secured under the direction of Captain CARNEY.

Edward McKay
EDWARD MC KAY

Sworn to before me this
25 day of February, 1974.

NOTARY PUBLIC

FRANCESCO J. MARCHITELLO
NOTARY PUBLIC, State of New York
No. 41-7737548 Queens County
Commission Expires March 30, 1976

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT
BEARING THE NUMBERS

332-9888, 332-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

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AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

RICHARD BLACK, being duly sworn, deposes and says:

I am a Police Sargeant, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by CAPTAIN CARNEY, I did remove from a secured room various original tape recordings marked "PLANT NUMBERS 2 & 3" specifically 7/7 Plants 2 & 3; 8/25 Plants 2 & 3; 9/1 Plants 2 & 3; 9/8 Plants 2 & 3; 9/15 Plants 2 & 3; 9/29 Plants 2 & 3; 10/20 Plants 2 & 3; 10/27 Plants 2 & 3; 11/16-11/17 Plants 2 & 3; 12/1 Plants 2 & 3; 12/8 Plants 2 & 3 for the purpose of copying said original tape recordings.

On each occasion after supervising the making of a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 & 3" to CAPTAIN CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

Each and every tape marked "PLANT NUMBERS 2 & 3" which I removed for purposes of duplication was returned to CAPTAIN CARNEY and was again secured under the direction of CAPTAIN CARNEY.

RICHARD BLACK

Sworn to before me this

28 day of February, 1974.

NOTARY PUBLIC

FRA[illegible] [illegible]
NOTARY PUBLIC, [illegible] of New York
No. 41-770[illegible]
Commission [illegible] 76

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

--x

IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENT BEARING
THE NUMBERS

382-9888, 382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

--x

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

LEROY COUNTS, being duly sworn, deposes and says:

I am a Police Officer, assigned to and working out of the Brooklyn North Public Morals District.

On several occasions, pursuant to authorization given me by Captain CARNEY, I did remove from a secured room various original tape recordings marked Plants 2 and 3 specifically 7/27 Plants 2 & 3; 8/3 Plants 2 & 3; 8/9 Plants 2 & 3; 8/10 Plants 2 & 3; 8/13-8/17 Plants 2 & 3; 8/21-8/24 Plants 2 & 3; 8/30-8/31 Plants 2 & 3; 9/7 Plants 2 & 3; 9/14 Plants 2 & 3; 9/20-9/21 Plants 2 & 3; 9/28 Plants 2 & 3; 10/4-10/5 Plants 2 & 3; 10/8-10/12 Plants 2 & 3; 10/19 Plants 2 & 3; 10/26 Plants 2 & 3; 10/29 Plants 2 & 3; 12/6-12/7 Plants 2 & 3 for the purpose of copying said original tape recordings.

On each occasion after making a true and exact copy of the original tapes, I returned the original tapes marked "PLANT NUMBERS 2 AND 3 to Captain CARNEY in the same condition as they were when I removed them.

At no time did I alter, tamper with, or delete any part or portion of said tapes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LAWRENCE ALFANO,

: 76 C 1610

- against -

UNITED STATES OF AMERICA,

Defendant.

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United States Courthouse
Brooklyn, New York

January 18, 1977
10:30 A.M.

Before:

HONORABLE MARK A. COSTANTINO, U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD R. KORMAN,
Assistant U.S. Attorney

MICHAEL DOWD, ESQ.
Attorney for Plaintiff.

THE CLERK: Civil hearing, Lawrence Alfano and Philip Albergo.

MR. KORMAN: Your Honor, I think if we took Alfano first, we could dispose of that pretty quickly.

THE COURT: All right.

MR. MEISNER: Good morning, your Honor.

THE COURT: Good morning.

MR. MEISNER: George Meisner, 16 Court Street,

MR. DOWD: Michael Dowd, 120-10 Queens Blvd. Kew Gardens, for the co-defendant.

Burton A. Kader is not here this morning. He couldn't come in. He just finished teaching a class at Hofstra. I have telephone communications with him if it is necessary and --

MR. KORMAN: I don't think it will be necessary.

Judge, as I understood your Honor's memorandum and opinion, this case is on for hearing today to determine, in effect, whether Judge Marlin was correct in his determination that there was no excusable reason for the delay in sealing.

THE COURT: Right.

MR. KORMAN: I had reviewed the sealing order and the papers that were underlying that order and I have concluded that we will not contest that issue. I would, however, like to have that sealing order and the underlying papers marked.

THE COURT: All right.

MR. KORMAN: As an exhibit at this hearing.
Here it is.

THE COURT: Are you contesting that bringing it by way of 2255--

MR. KORMAN: We already argued with respect to Alphonso. I assume that we are not going to reargue. Of course, we adhere to all our prior positions on that question.

THE COURT: All right.

MR. KORMAN: My concession applies to this case for the time.

THE COURT: Alfano.

MR. KORMAN: I want to deal with this first.
Your Honor, next -- could we have that formally--

THE COURT: Mark it.

MR. KORMAN: The next thing that I would like to have marked, your Honor, are the documents that were referred to in the moving papers. That is, Mr. Rosner allegedly received a stack of papers which he allegedly did not have time to review. And I think that the record should reflect --

THE COURT: At the time of trial.

MR. KORMAN: And your Honor in effect made a finding that that was not sufficient time. I think the very documents that he said he did not review should be made part of the --

MR. DOWD: I want to state for the record that these are a stack of documents which were received by myself on August 19th, 1976, from Mr. Rosner, and represented by -- a representation was made to me by Mr. Rosner that these were the only papers which he received immediately prior to the hearing. On receipt of these documents I immediately fastened all of them together, sealed them by means of tape, put my initials and the date that I received them on the front of the documents. And I would offer these to be marked with respect to the hearing.

THE COURT: All right.

MR. KORMAN: There is just one more.

THE COURT: That's petitioner's --

MR. KORMAN: Actually, two more, as long as I think about it. Your Honor, the original underlying proceedings were really two-fold. That is, there was an original indictment which was I believe -- I believe 74CR818. And that was superseded by the indictment that Mr. Alfano ultimately went to trial on, which was 75 CR 298.

THE COURT: All right.

MR. KORMAN: Those were in the day before we started keeping the same docket number when the superseding indictment was returned. And, therefore, there are papers relating to this in two separate files of the Court.

THE COURT: Ok.

MR. KORMAN: I would ask that when your Honor enters the order, that it be based on the proceedings had in 74 CR 818 and 75 CR 298. It's in some of the original motion papers were filed and they are in the file in 74 CR 818 in that way, they can both be part of the record of appeal.

MR. DOWD: May I make another comment for the record just to clarify this -- to the label, defendant's exhibit A. And that is that throughout the papers and documents there are --

THE COURT: That should be the petitioner's.

MR. DOWD: Should be petitioner's.

THE COURT: It shouldn't be defendant's. You can use the --

THE CLERK: I don't have a--

THE COURT: We will mark it petitioner's.

MR. DOWD: Petitioner's exhibit A.

There are handwritten notes and drawings drawn under some of the lines of different pieces of paper.

Those were all made, to my knowledge, by Mr. Rosner. I did not make any markings on these documents whatsoever. So the record is clear that we have them --

MR. KORMAN: Now, there is one more matter. If your Honor will recall the moving papers certainly and to a certain extent the memorandum reflected disparingly on Mr. Rosner --

THE COURT: Yes.

MR. KORMAN: And I have showed Mr. Rosner the opinion largely, because I had known him for some time and I have a certain amount of personal fondness for him, and asked him --

THE COURT: I have respect for him. I know Mr. Rosner myself.

MR. KORMAN: And I told him that if he wanted to prepare an affidavit, that I thought it would be fair that at least the record should reflect that the denial on his part of some of the more scurrilous allegations which suggest that for lack of a fee he refused to raise this issue. And he's prepared an affidavit. And I will say this, your Honor, that if you read it, you will see it is not entirely helpful to the Government. But I think -- and I submit it merely so that the record reflects some defense of his position.

THE COURT: Well --

MR. KORMAN: I have given a copy to counsel.

MR. MEISNER: Can I get a copy of that?

MR. KORMAN: I will give it to you. It is not related to your case.

MR. MEISNER: All right.

Anything that is --

THE COURT: I know.

MR. MEISNER: (Continuing) - that refers to the Government, I think I should have a copy of.

MR. KORMAN: It is a public record.

MR. DOWD: Your Honor --

MR. KORMAN: All right, I have finished.

MR. DOWD: I am sorry. Are you finished?

MR. KORMAN: Yes, I have nothing more to say.

MR. DOWD: Your Honor, I think in respect to Mr. Rosner's affidavit, I think it's -- I don't object to him making an affidavit, but I think it's -- it's somewhat late in terms of the proceedings. I don't mind him defending himself in some respects. In addition to which, I will --

THE COURT: Well, go ahead.

MR. DOWD: In addition to which, some ofthe statements that he makes, I would like -- since I only got this this morning, just an opportunity of a day or so to review these and perhaps talk to Mr. Rosner to determine whether we would --

THE COURT: I don't think that I have seen the affidavit. I assume he's talking about his integrity when he writes this affidavit.

MR. DOWD: I am not really talking about his integrity. But there may be some statements based on hearsay. I would like to clarify --

THE COURT: That's possible, too.

MR. DOWD: Yes.

That's really --

THE COURT: No different from any other lawyer who makes the same type of affidavit from the same type of circumstances. Nothing unusual about it.

MR. KORMAN: Well, do you want some more defined before the order is entered?

THE COURT: Do you think it's necessary?

MR. KORMAN: I have no objection.

THE COURT: I really don't think it goes to the merits of the situation.

MR. DOWD: No.

THE COURT: It is really a question of time as to the record that is before the Court as to whether or not the first proposition of the competency of counsel --

MR. DOWD: I agree.

THE COURT: And the second proposition of the integrity of the evidence itself.

MR. DOWD: I agree.

THE COURT: Which will all have to come to light eventually, whether here or upstairs.

MR. DOWD: I agree.

I would say, if there is some serious issue I will call your chambers.

THE COURT: Yes. And advise Mr. Korman.

MR. DOWD: But it does not appear so because Mr. Korman candidly stated that much of the affidavit supports our initial position.

THE COURT: All right.

MR. KORMAN: I am finished with this case.

THE COURT: That's it. Then the order will be entered.

* * * * * * * * * * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--------------------------------------x
LAWRENCE ALFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
--------------------------------------x

76-C-1610

MEMOR[illegible]UM
and [illegible]

DEC, [illegible] 6

COSTANTINO, D.J.

On October 22, 1975, Lawrence Alfano (hereinafter "petitioner") was found guilty after a jury trial of each of two counts charging knowing possession of airline tickets valued in excess of one-hundred ($100.00) dollars which were stolen from a shipment moving in interstate commerce (18 U.S.C. § 659). After an unsuccessful appeal to the United States Court of Appeals for the Second Circuit, petitioner began serving concurrent 2-year sentences imposed by Judge Orrin G. Judd.

One of the crucial elements of proof at trial was whether or not the defendant knew the tickets were stolen when he purchased and used them. As proof of Alfano's knowledge the government relied on a recorded telephone conversation which was obtained pursuant to a

New York State wiretap order.

In a related criminal proceeding in New York State Supreme Court involving the same wiretap, Justice Milton Mollen found that there was an 85-day delay in sealing. (People v. Mangiaracina, Supreme Ct., Kings County, oral decision July 15, 1976, transcript, p. 43). Justice Mollen concluded that due to the failure of the people adequately to explain the delay, see United States v. Gigante, 538 F.2d 502 (2d Cir. 1976), the wiretap would have to be suppressed. It appears from the papers that the specific issue of sealing was never raised before the United States District Court or the United States Court of Appeals. Petitioner now moves via 28 U.S.C. § 2255 to have his conviction set aside on the grounds that as a result of the government's failure to "immediately" present the crucial wiretap for judicial sealing in accordance with 18 U.S.C. § 2518(8)(a), this court must vacate his conviction and order that the wiretap be suppressed at any subsequent trial.

The government opposes the motion arguing that a violation of 18 U.S.C. § 2518(8)(a) is not grounds for relief under § 2255 and that in any event the failure to make a timely motion for suppression at trial constitutes waiver and precludes § 2255 relief. Petitioner contends that the violation is properly cognizable under § 2255 and that the previous failure to raise the sealing issue was due to either (1) ineffective assistance of counsel at trial and appeal, or (2) the failure of the trial court to provide an adequate opportunity to raise the issue.

In Davis v. United States, 417 U.S. 333, 346 (1974) the Supreme Court held that collateral relief under § 2255 is available for non-constitutional claims when the asserted error is "a fundamental defect which inherently results in a miscarriage of justice" and where "exceptional circumstances" make the necessity of collateral relief apparent. The failure to suppress a wiretap not authorized in conformity with the requirements of 18 U.S.C. § 2518(10)(a) has been held to constitute a "fundamental defect." See United States v. Consiglio, 391 F. Supp. 564 (D. Conn. 1975). A violation of the type raised in Consiglio, while a statutory violation, is clearly not an error which goes to the "integrity" of the evidence. Cf. Stone v. Powell, ___ U.S. ___, 96 S.Ct. 3037 (1976). The failure to present a wiretap for judicial sealing, however, is an error that does go to the integrity of the evidence. Wiretaps "lend themselves to diabolical fakery." Lopez v. United States, 373 J.S. 427, 468-469 (1962) (Brennan, J., dissenting); United States v. Gigante, supra at 505. And the requirement of immediade judicial sealing is an integral part of the congressional scheme to preserve the integrity of the tapes. United States v. Gigante, supra.[1]

In light of these considerations, this court concludes that the failure to present tapes for judicial sealing in accordance with 18 U.S.C. § 2518(8)(a) is a proper ground for relief under 28 U.S.C. § 2255.

This court further concludes that under the circumstances present in this case, petitioner did not waive his rights by failing to raise the issue at trial. The failure to object was not a result of deliberate trial strategy, cf. United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

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[1] Because the failure to present for judicial sealing goes to the "integrity" of the evidence, the cases cited by the government involving "technical" errors are not applicable, e.g., United States v. Wright, 524 F.2d 1100 (2d Cir. 1975).

Rather it appears to have been a result of one or both of two causes: (1) inadequate opportunity to examine and develop the relevant facts, and (2) inadequate representation by counsel.

Prior to the commencement of his trial in federal court, petitioner moved to suppress the tape. The wiretap orders were not turned over to his attorney for inspection, however, until the day of the hearing. Petitioner's counsel was therefore not able to read them prior to the hearing (transcript of hearing, May 9, 1975, p. 37). As a result, the hearing before Judge Judd was not sharply focused and apparently no ruling was made. Further argument was scheduled for a later date to enable more thorough review of the orders. Prior to the adjourned date, however, petitioner's counsel submitted an affidavit indicating that he was "not in a position to prepare further for trial," and indicating that he was prepared to accept the "ruling" of the court not to suppress (although there is no indication from the transcript that such a ruling was made). And, although petitioner's attorney raised various objections to the wiretap both at the hearing and in his affidavit, he did not question the lack of judicial sealing despite his awareness of the related state court proceeding in which Justice Mollen eventually suppressed the tape for lack of sealing (Tr. of hearing 5/9/75, p. 29, 35-36). Furthermore, at the time the case was on appeal, petitioner's attorney wrote a letter to petitioner complaining that he had not been paid and declaring

> We shall complete the appeal on your behalf since we have indicated to the Court we will do so, although *I must state that I do not do it with any great degree of interest*, and also indicate that we will not, under any circumstances, engage in any post-appeal motions which we had earlier discussed, in the event your conviction is affirmed. (emphasis added)

It is not necessary to determine whether the failure to raise the sealing issue coupled with the "disinterest" of the attorney in this case rise to the level of inadequate representation. *See Lunz v. Henderson*, 533 F.2d 1322 (2d Cir. 1976). For it is clear that, when the quality of representation is examined in conjunction with the failure to provide adequate time prior to hearing for the examination of the wiretap order, *see Kaufman v. United States*, 394 U.S. 217, 227 (1969), "exceptional circumstances" are present warranting habeas corpus relief. *Davis v. United States, supra*.

Having concluded that petitioner has not waived his rights and may properly proceed under § 2255, this court must determine the merits of the claim and the appropriate relief, if any. Justice Mollen's decision to suppress the tape, while persuasive, is of course not binding on this court. Accordingly, the parties are ordered to appear on January 18, 1976 for the purpose of a hearing on the merits. At that time the government is directed to present any evidence in accordance with United States v. Gigante which would satisfactorily explain the absence of a judicial seal. Petitioner's bail is continued pending a final determination on the merits. So ordered.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTFICT OF NEW YORK

-----------------------------------x

LAWRENCE ALFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

-----------------------------------x

76-CR-1610

ORDER

JAN 2 [illegible]

COSTANTINO, D.J.

In a Memorandum and Order signed December 21, 1976, the court directed that a hearing be held on the merits of petitioner's suppression motion. Upon the representations and arguments of the parties, the written briefs, and a review of the record in 74-CR-818 and 75-CR-298, it is

ORDERED, that the judgment of conviction filed under docket number 75-CR-298 be set aside and that the government retry the petitioner within 60 days. At the subsequent trial the challenged wiretap shall be suppressed.

U. S. D. J.

SUPREME COURT : SUFFOLK COUNTY

BEST COPY AVAILABLE

PENGAD-BAYONNE, N.J.
75 C 1413
DEFENDANT'S EXHIBIT
A

In the Matter

of

Intercepting telephonic communications transmitted and received over telephone line and instrument LT9-1547, a non-published telephone line and instrument, assigned to VETERANS CONSTRUCTION CO., and located at 4392 Sunrise Highway, Oakdale, Suffolk, County, New York, and recording the conversations of SALVATORE VANUTO, specifically those conversations containing evidence of the crimes of Conspiracy, Promoting Gambling, Possession of Gambling Records, and Conspiracy to commit the within crimes as well as the conversations transmitted by confederates of the aforesaid individuals where it appears that the said conversations contain evidence of the said criminal activities of the aforesaid individuals.

It appearing from the affidavit of GEORGE J. ASPLA District Attorney of the County of Suffolk, and DETECTIVE PETER LOUGHLIN, assigned to the Special Investigations Section of the Suffolk County Police Department, that there is probable cause to believe that evidence of the crimes of Conspiracy, Promoting Gambling, Possession of Gambling Records, and Conspiracy to commi the within crimes may be obtained by intercepting the telephonic communications transmitted and received by SALVATORE VANUTO and his confederates over the telephone line and instrument bearing the number LT9-1547, a non-published number assigned to the VETERANS CONSTRUCTION COMPANY and located at 4392 Sunrise Highwa Oakdale, Suffolk County, New York;

And the court further being satisfied that normal investigative procedures have been tried and have failed and tha

A-769

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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NO UNDERLYING PAPERS

IN THE MATTER

OF

THE APPLICATION OF EUGENE GOLD,
DISTRICT ATTORNEY OF THE COUNTY OF KINGS,
TO SEAL AND DETERMINE CUSTODY OF RECORDINGS
INTERCEPTED PURSUANT TO AN EAVESDROPPING
WARRANT OVER THE TELEPHONE INSTRUMENTS
BEARING THE NUMBER
382-9888
382-9889

KNOWN AS PLANT NUMBERS 2 & 3 RESPECTIVELY

ORDER
SEALING RECORDINGS AND DETERMINING CUSTODY

---x

It appearing from the annexed application of EUGENE GOLD, District Attorney of the County of Kings, State of New York, sworn to the 4 day of March, 1974, and the papers incorporated therein including the affidavits of CAPTAIN WILLIAM CARNEY, LIEUTENANT MARTIN KENNEDY, SARGEANTS JAMES COCALAS, RICHARD BLACK AND JOHN BRUNKARD, POLICE OFFICERS JOHN CURD, EDWARD MC KA LEROY COUNTS working out of Brooklyn North Public Morals District, that on June 1 1973, an Eavesdropping Warrant was signed by the Honorable HENRY MARTUCELLO, Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Department, permitting the interception of communications of certain unknown individuals transmitted over telephone instruments bearing the numbers 382-9888 and 382-9889 and listed in the records of the New York Telephone Company in the name of CROSSROADS LOUNGE, 53-57 Metropolitan Avenue, Queens, State of New York. Said Warrant was renewed on July 13,1973 by JUSTICE MUNDER, on August 13,1973 by JUSTICE CULOTTA, on September 11,1973 and October 11,1973 by then PRESIDING JUSTICE RABIN and on November 10,1973 by JUSTICE BENJAMIN and terminated on December 10,1973.

.../

Appearing to the satisfaction of the court that tape recordings were made of conversations intercepted over the telephone instrument bearing the numbers 382-9888 and 382-9889 pursuant to the aforementioned Eavesdropping Warrant and it also

Appearing that a code name was assigned to the conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3",and it further

Appearing that the original tape recordings made of conversations intercepted over telephone instrument bearing the numbers 382-9888 and 382-9889 known as "PLANT NUMBERS 2 & 3" were kept under lock and key at all times while in the custody of CAPTAIN CARNEY,and it also

Appearing that the original tape recordings made of conversations intercepted over telephone instruments 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3" have not been altered, changed, nor any deletions made therefrom while in the custody of CAPTAIN CARNEY, and it also

Appearing that the cartons marked "PLANT NUMBER 2, BOX #1, REELS 34-164, 7/18/73-12/3/73; BOX #2, REELS 15-33, 6/29/73-7/17/73; BOX #3, REELS 1-14, 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73 and 11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES 38-173(end) 7/25/73-12/10/73; BOX #3, TAPES 15-37 7/1/73-7/24/73; BOX #4,TAPES 1-14 6/15/73-6/30/73 contain each and every original tape recording made of conversations intercepted over telephone instruments 382-9888 and 382-9889, in an unaltered condition it is therefore

ORDERED, that the original tape recordings of conversations intercepted over the telephone instrument bearing the numbers 382-9888 and 9889 contained within cartons marked PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-

.../

12/3/73; BOX #2, REELS 15-33, 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6 DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES 38-173(end) 7/25/73-12/10/73; BOX #3, TAPES 15-37 7/1/73-7/24/73; BOX #4, TAPES 1-14 6/15/73-6/30/73 shall be and the same hereby are sealed pursuant to Section 700.50 of the Criminal Procedure Law and it is further

ORDERED, that the original tape recordings of the conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889 contained within cartons marked PLANT NUMBER 2, BOX #1, REELS 34-164 7/18/73-12/3/73; BOX #2, REELS 15-33 6/29/73-7/17/73; BOX #3, REELS 1-14 6/15/73-6/28/73; BOX #4, DIAL RECORDER, TAPES 12/1/73-12/10/73; BOX #5, DIAL RECORDER, TAPES 10/73-11/73; BOX #6, DIAL RECORDER, TAPES 8/73-9/73; BOX #7, DIAL RECORDER, TAPES 6/73-7/73 and PLANT NUMBER 3, BOX #1, DIAL RECORDER, TAPES 7/73-12/73; BOX #2, TAPES 38-173(end) 7/25/73-12/10/73; BOX #4, TAPES 1-14, 6/15/73-6/30/73 shall be and the same hereby are to be kept in the custody of the District Attorney of the County of Kings.

DATED: Brooklyn, New York

March 5, 1974.

Associate JUSTICE OF THE SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

RITA BLOOM being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of April 1977 she served a copy of the within

APPENDIX

by placing the same in a properly postpaid franked envelope addressed to:

Michael G. Dowd, Esq.
Manton, Pennisi, Dowd & Schwartz, Esqs.
120-10 Queens Boulevard
Kew Gardens, New York 11415

and deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Rita Bloom

Sworn to before me this
20th day of April 1977.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979